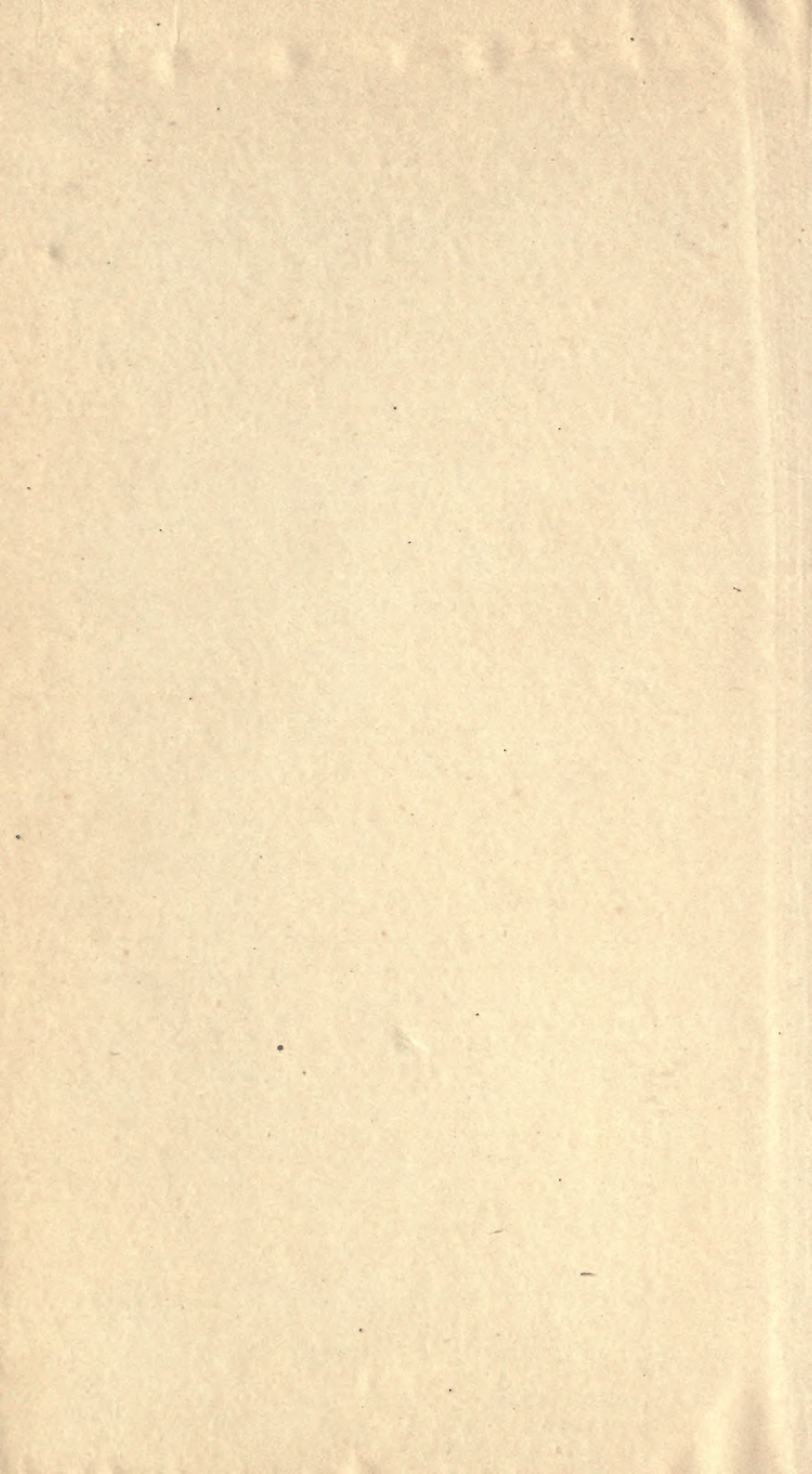
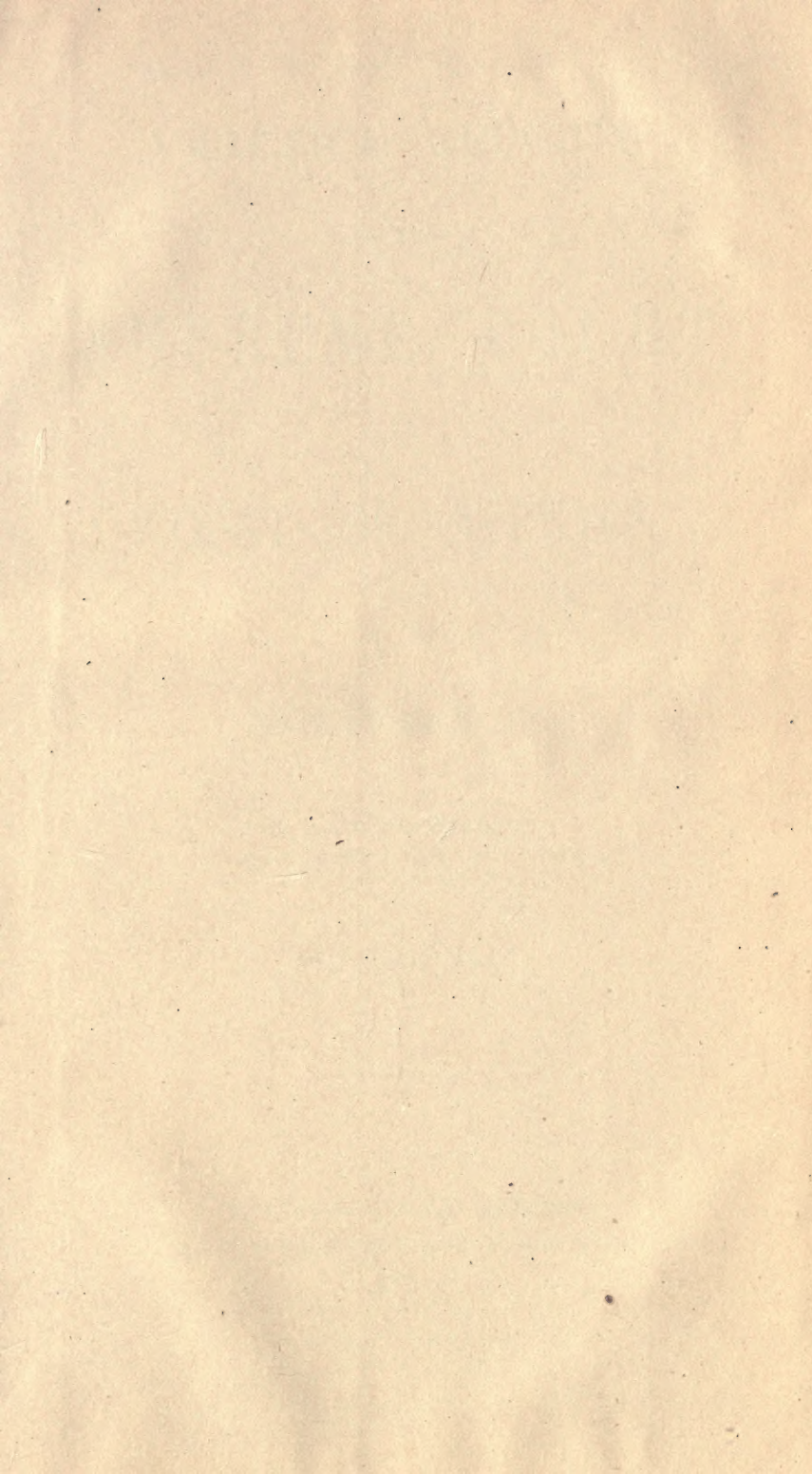






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New York (State) Reports. Supreme Court.

PRACTICE REPORTS

IN THE

SUPREME COURT

AND

COURT OF APPEALS,

OF THE

STATE OF NEW YORK.

By NATHAN HOWARD, JR.,
COUNSELLOR-AT-LAW, NEW-YORK.

VOLUME XLI.

ALBANY:

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PRACTICE REPORTS.

SUPREME COURT.

BENJAMIN HOLDEN and others, respondents agt. RICHARD CLANCY and others, appellants.

Where a written contract is entered into between the plaintiffs and defendants by which the latter agree to rent to the plaintiffs a cattle barn connected with the defendant's distillery, for a certain time, and also agree to furnish to the plaintiffs, at the barn, slops from their distillery—One hundred and eighty-three bushels of slops *per diem*, during the term; and the plaintiffs agree to pay for the slops and the rent of the barn, at the rate of nine cents per bushel of the slops furnished, which agreement is carried into execution by the parties according to its terms:

The contract is not one to manufacture or furnish a manufactured article, in the sense that in every sale and purchase of an article to be manufactured, there is an *implied warranty* that the article, when delivered shall be of a *merchantable quality*; nor does an article, designated no otherwise than as "slops from their distillery," constitute a manufactured article within the meaning of the rule which implies a warranty of merchantable quality.

Consequently, an objection made by the plaintiffs pending the contract, that the defendants were buying and using in their distillery damaged grain or grain which had been scorched and injured by fire during the burning of an elevator in which it was stored, the slops from which were injurious to the plaintiff's cattle which they were fattening, could have no force or effect in reference to a recovery upon an implied warranty of the value of the slops.

It is not reasonable to suppose that in contracts for the sale of this refuse material, it is the expectation of either party that the manufacturer is to be controlled in his choice of material or machinery to be used, by any consideration as to the effect which it may have upon the value of the refuse material resulting from the process.

And it seems absurd to suppose there can be, in the absence of express contract or of fraud or imposition, any responsibility for the quality of what is sold as slops or swill. The plaintiffs had what they bargained for, "slops from the distillery," and it would seem reasonable to apply to such a case, the doctrine of *caveat emptor*.

But if there were a warranty of merchantable quality implied in such a sale, the

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plaintiffs would not be entitled to recover in this case, since it appeared that they received and consumed the slops from day to day, with a full knowledge of their quality, and without returning or offering to return them, or giving the defendants notice to take them away or not deliver any more. This was a complete waiver of the alleged defects.

Fourth Department, January Term, 1871.

MULLIN P. J., JOHNSON and TALCOTT, JJ.

THIS is an appeal by the defendants from a judgment rendered against them on the report of a referee.

HUNT & GREEN, *for appellants.*

D. PRATT, *for respondents.*

By the court, TALCOTT, J.—The facts in this case are substantially as follows: In October 1866, the plaintiffs and defendants entered into a contract in writing by which the defendants agreed to rent to the plaintiffs a cattle barn, connected with the defendants' distillery, till May 1, 1867, and also agreed to furnish to the plaintiffs at the said barn, slops from their said distillery; one hundred and eighty-three bushels of slops per diem, during the term; and the plaintiffs agreed to pay for the slops and the rent of the barn, at the rate of nine cents per bushel of the slops furnished, payable monthly. The contract was entered into by the plaintiffs with a view of fattening cattle for market, keeping the cattle in the barn during the winter. The plaintiffs after the making of the contract placed a large number of cattle in the barn, and kept them there during the winter. The defendants furnished the amount of slops from their distillery specified in the contract, and they were received by the plaintiffs daily, and fed to the cattle, and paid for monthly as specified in the contract. The complaint in the action, after stating the contract and the placing of the cattle in the barn, proceeds to allege that very soon thereafter, the defendants, against the dissent of the plaintiffs, purchased damaged grain which was totally unfit for the purpose of manufacturing the slops mentioned in the con-

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tract, and used the same in their distillery, and from the same, manufactured and delivered slops to the plaintiffs, which the plaintiffs refused to receive, *as in any way a fulfillment of the contract on the part of the defendants.* And that by reason thereof the plaintiffs have sustained damages.

It appears that during the winter, the defendants purchased and distilled in their distillery a quantity of grain which had been contained in an elevator at Oswego, which had been burned. That a portion of the slops, and perhaps two thirds, furnished to the defendants were the slops from this damaged grain.

And the plaintiffs adduced testimony showing that these slops were full of gravel, ashes and cinders, and were black, and tending to show that they were not fit for the purpose of fattening cattle, and according to some witnesses, were worth nothing at all, whereas good slops were worth from fifteen to twenty cents per bushel.

They also gave evidence tending to show that some of their cattle had gained nothing at all in weight, while the majority of them had gained only an average of 57lbs per head, whereas they should have gained in weight an average of 200lbs. per head. It appeared that the plaintiffs on several occasions complained to the defendants or their agents at the distillery that the slops were not good, and on one occasion threatened to sue the defendants on that account if the cattle did not do well.

Witnesses on the part of the defendants who had used the same slops, testified that the quality was good and that their cattle, fed on them, did well.

The referee finds that the slops furnished the plaintiffs for one hundred and twenty-five days of the time, "was inferior and not merchantable." And that by reason thereof the plaintiffs sustained damages to \$1,029 37, for which amount he ordered judgment.

Van Buren, one of the plaintiffs, testified that he "knew the quality of the slops all the time it was being fed to the

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cattle." And the referee finds that the payment for the slops was made after they had been received and used by the plaintiffs, and that the plaintiffs did not offer to return any of the slops to the defendants, or give them notice to take any part of them back.

On this state of facts the plaintiffs claim to sustain this recovery, upon the ground that the contract is for the sale and purchase of an article to be manufactured, and that in every such sale there is an implied warranty that the article when delivered, shall be of a merchantable quality. We do not think the agreement in this case is to manufacture or furnish a manufactured article, in the sense of the rule referred to, or that an article designated no otherwise than as "slops from their distillery," constitutes a manufactured article within the meaning of the rule which implies a warranty of merchantable quality. A manufacture is defined as "the process of making anything by art, or of reducing materials into a form fit for use, by the hand or by machinery." And it seems to imply a proceeding wherein the object or intention of the process is to produce the article in question. The residuum or refuse of various kinds of manufactories is more or less valuable for certain purposes. And may be, and often is the subject of sale, but it is not expected that the skill and attention of the manufacturer is to be devoted to the quality of the refuse material. This is not the object of the process, and its quality is wholly subordinate, and disregarded, when attention to it would interfere with the most profitable mode or material to be used in the process which is the main object of the manufacturer.

It is not reasonable to suppose that in contracts for the sale of this refuse material it is the expectation of either party that the manufacturer is to be controlled in his choice of material or machinery to be used, by any consideration as to the effect which it may have upon the value of the refuse material resulting from the process.

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And it seems absurd to suppose there can be, in the absence of express contract and of fraud or imposition, any responsibility for the quality of what is sold as slops or swill. The plaintiffs had what they bargained for "slops from the said distillery," and it would seem reasonable to apply the doctrine of *caveat emptor* to such a sale, if ever.

But if there were a warranty of merchantable quality implied in such a sale, the plaintiffs would not be entitled to recover in this case, since it appears that they received and consumed the slops from day to day, with a full knowledge of their quality and without returning or offering to return them, or giving the defendants notice to take them away or not to deliver any more. This fact, upon well settled principles governing executory contracts of sale, was a complete waiver of the alleged defects. The defendants offered to sell the article at a certain price. The plaintiffs cannot make a different contract for the defendants, or receive and use the article at a less price without their consent, unless prevented from rejecting it by want of knowledge of, or opportunity to ascertain the alleged defects.

It is not improbable from the testimony, that if the plaintiffs had refused to receive and consume the slops in question, the defendants might have obtained the same or a better price from other parties. The case, on this point, seems to be entirely within the principle of *Reed agt. Randall*, (29 N. Y., 358); see also *Hoe agt. Sanborn*, (21 N. Y., 552, 556,) and *Howland agt. Hoey*, (23 Wend., 357.)

Judgment must be reversed, and a new trial must be granted, costs to abide the event.

Cooney agt. Whitfield.

NEW YORK COMMON PLEAS.

MICHAEL COONEY agt. HOWARD WHITFIELD.

It is not necessary that the facts stated in an affidavit for an *attachment* under the act of 1831, should be decisive of a design on the part of the debtor to assign or dispose of his property with the intent to defraud his creditors. It is sufficient if they *legally aim or tend* to sustain that averment.

Held, that the facts and circumstances stated in this case, taken together, furnished, while uncontroverted, sufficient evidence upon the point of the defendant's *fraudulent intent respecting the disposition of his property*, to uphold the attachment. (*This, perhaps, may be considered a pretty close case on the question of a fraudulent intent in the disposition of property to cheat creditors.*—REP.)

General Term, March, 1871.

Before ROBINSON, LOEW and J. F. DALY, JJ.

APPEAL from a judgment that the action be dismissed, rendered in the eighth district court.

This suit was brought to recover \$192 25, being a balance due plaintiff for work done and money loaned by him to the defendant.

This action was commenced by attachment under the act of 1831, to abolish imprisonment for debt.

On the return day of the attachment the defendant's counsel moved to vacate the same on the ground that the affidavits upon which it was allowed were insufficient to authorize the issuing thereof.

The justice granted the motion, vacated the attachment and dismissed the action, with costs and extra costs.

The plaintiff appealed to this court.

DAVID MCADAM, *for plaintiff, appellant.*

H. D. LEPAUGH, *for defendant, respondent.*

LOEW, J.—I think the justice erred in vacating the attachment.

Cooney agt. Whitfield.

The affidavits upon which he allowed the same showed that the defendant was indebted to the plaintiff in a specified sum, over all payments and set offs, for money loaned and work done ; that the defendant, had a short time before purchased his stock of goods amounting to about \$1,000, mainly on credit ; that he was rapidly selling the same off at about cost ; that he had no other property ; that he borrowed money of several parties, whose names were given, and while refusing to repay it, he was endeavoring to borrow more ; that he was indebted to numerous persons who were named, and whom he refused to pay ; and that although he had money constantly coming in, he retained the same, and neglected and refused to pay his men, but kept putting them off from time to time, under various pretexts.

It further appeared, that when the plaintiff requested the defendant to pay him, the latter held up a handful of bills and told the former not to ask him for money, as he did not owe him one cent, and at another time he said that he would never pay him, and speaking about failing, he remarked, that he would not fail for a few hundred dollars ; but when he did so, he would fail heavy, as he intended to make something.

It seems to me that all these facts and circumstances taken together, furnished while uncontroverted, sufficient evidence upon the point of the defendant's fraudulent intent, respecting the disposition of his property, to uphold the attachment.

It is not necessary that the facts stated in the affidavit should be decisive of a design on the part of the debtor to assign or dispose of his property with the intent to defraud his creditors.

It is sufficient if they legally aim or tend to sustain that averment. (*Talcott agt. Rosenberg*, 8 Abb., N. S., 287, and cases there cited.)

The judgment of the court below should be reversed.

ROBINSON and J. F. DALY, JJ., concurred.

Rousso agt. Vontrin.

SUPREME COURT.

LOUIS ROUSSO agt. VICTOR M. VONTRIN.

Where, at the close of the evidence on the trial, the court directed a verdict for the plaintiff, and ordered the action reserved for further consideration, with leave to the defendant to move for a new trial on a case to be made and settled in the usual manner; and without waiting for the determination of the court upon the case reserved, and before any order directing judgment in the action, the defendant made and served a case, which was settled in the usual form, and thereupon, moved for a new trial on notice at a special term, held by the same judge who tried the cause, the plaintiff at the same time, moved for judgment on the verdict; and the motion for a new trial was denied, and judgment directed for plaintiff on the verdict:

Held, that the plaintiff was not entitled to costs:—Before argument on a case, for a new trial, \$20, and for argument of said case, \$40.

The motion for a new trial, allowing the practice to be correct, was premature; as at the time it was made the trial of the action was not finished; the final determination was suspended until the further order of the court—a suspension the court had authority to make (*Code*, § 264).

Until the further order of the court, no judgment could be entered, as it was undetermined who should have judgment. The hearing of the case reserved was part and parcel of the original trial, to which subdivision five of section 307 of the Code has no application.

St. Lawrence County Special Term, February, 1871.

MOTION for readjustment of costs.

Issue was joined in this action, and was tried at the Jefferson county circuit, October, 1870. When the evidence was closed on the trial the court directed a verdict for the plaintiff, and ordered the action reserved for further consideration, with leave to the defendant to move for a new trial on a case to be made and settled in the usual manner.

Without waiting for the determination of the court upon the case reserved, and before any order directing judgment in the action, the defendant made and served a case, and the same was settled in the usual form, and thereupon,

Rousso agt. Vontrin.

moved for a new trial on motion, at a special term, held by the same judge who tried the cause, the plaintiff at the same time moved for judgment on the verdict. The motion for a new trial was denied, and judgment directed for plaintiff on the verdict.

In the bill of costs presented by plaintiff for adjustment, he claimed: before argument on a case for a new trial, \$20 00; for argument of said case, \$40 00. These items were properly objected to by the defendant, but were allowed by the clerk. From this allowance the defendant moved for a re-adjustment, and a disallowance of said items.

J. F. STARBUCK, *for the motion.*

M. C. LEE, *in opposition.*

JAMES, J.—The two items objected to are claimed as allowable under subdivision five of section 307 of the Code. That subdivision of the section gives to the successful party on appeal to the supreme court, except those allowed by subdivisions one, three, four and five of section 349, and by the second paragraph of section 244, \$20 before argument and \$40 for argument; and it allows the same sums before argument, and for argument on application for judgment on special verdict, or upon a verdict subject to the opinion of the court, *or for a new trial on a case made, &c.*

The motion for a new trial in this case was premature. At the time it was made the trial of the action was not finished; the final determination was suspended until the further order of the court, a suspension the court had authority to make (*Code*, § 264). Until the further order of the court no judgment could be entered, as it was undetermined who should have judgment. The hearing of the case reserved was part and parcel of the original trial, to which subdivision five section 307 has no application.

The permission given defendant to make a case upon which to move for a new trial, was a proceeding entirely

Rousso agt. Vontrin.

independent of the cause as held for further consideration, and its exercise by the defendant was probably not contemplated until after an order for judgment had been directed in the action. On a case so reserved, the judge holding it, has no power to grant a new trial, as upon a case; his duty is either to direct a judgment for the plaintiff on the verdict, to dismiss the complaint, nonsuit the plaintiff, or direct judgment for the defendant.

In ordinary practice a party does not move for a new trial on a case until defeated on the trial. Until then he cannot know that he desires a new trial. The court may possess the power to grant a party special leave to make a case, and move thereon for a new trial, before judgment ordered (*see* 41 N. Y., 228). But it would seem quite unnecessary to attempt to make the permission available before the trial is finished.

Under the Code, the usual mode of reviewing the verdict of a jury upon the evidence, is by motion for a new trial on a case. It is not the mode for a reviewing questions of law. It is a proceeding distinct from an appeal, or from a motion for a new trial for error of law, although it may be pursued with either. A motion for a new trial for error of law, can only be raised by exceptions; this order is limited to a motion for a new trial on a case; and as there was no verdict, rendered by the jury, upon their consideration of the evidence, it having been directed by the court, there was nothing before the court which could be reached by a motion for a new trial on a case; if it was wrong to direct the verdict, it was error of law, and could only be reached by exception.

The court gave the defendant leave to make and have settled a case, and to move thereon for a new trial; whether or not it was the proper practice, the defendant availed himself of it, has had his day in court, without objection, and been defeated. Being no part of the case reserved for consideration, but a separate and distinct proceeding, it

Rousso agt. Vontrin.

must be treated, as to costs, as though it were an ordinary motion for a new trial on a case.

In this view the question presented is precisely that passed upon in *Scudder* agt. *Gori* (28 How., 155), by the general term of the superior court of New York, and in *Stitt* agt. *Rowley* and *Selover* agt. *Wisner* (37 How., 176 and 179), at a special term of this court.

Motion denied.

Matter of Commrs. of Central Park.

SUPREME COURT.

IN THE MATTER OF THE APPLICATION OF THE COMMISSIONERS OF THE CENTRAL PARK, for and in behalf of the Mayor, Aldermen and Commonalty of the City of New York, relative to the opening of certain new avenues, roads and public squares or places as laid out by the Commissioners of the Central Park, in the City of New York.

The proceedings in reference to improvements, under which the assessments and awards are made and imposed in regard to the Central Park are regulated entirely by statute.

It was clearly the intention of the legislature to make the *confirmation of the report* of the commissioners of estimate and assessment, final and conclusive in reference to their proceedings, as between the commonalty of New York and all persons whomsoever, in reference to the land taken and the estimate and assessment made and imposed.

All persons are thus advised, that being given the opportunity to be heard, they must appear and by objection, either to the commissioners of estimate and assessment, or submitted to this court, protect whatever rights are invaded or jeopardized.

The applicant in this case, in moving to set aside the order confirming the report of the commissioners of estimate and assessment, does not seem to have presented any objection either to the commissioners or to the court.

Although the award was made to the applicant in the first instance, he could not be justified in relying upon the entry and the abstract of the report, as the object of the publication of notice would be defeated, if the abstract could not be altered; and it was the duty of the applicant to see, if he meant to rely upon it as originally prepared, that it was not at the instance of any subsequent claimant having even an apparent title, altered to his prejudice.

The alteration or correction may be made according to the statute, at any time before the report is presented to the court, after publication; and in this case the alteration appears to have been made at the proper time.

Although the report, having been confirmed, is final and conclusive in regard to the estimates and awards, it is not conclusive upon the rights of claimants *inter sese*. The remedy in such case is by action against the person to whom the award was given, after payment thereof to him, by the person to whom of right the money paid belonged.

Special Term, December, 1870.

THIS was a motion made to set aside the order confirming the report of the commissioners of estimate and assessment

appointed for the opening of the Morningside Park, so far as it related to the five lots hereinafter mentioned, and which were taken for said park, and also for an order directing the said commissioners to make the awards for the said lots to Patrick Callaghan or unknown owners. The report of the commissioners was confirmed July 28th, 1870, and contained awards to Phineas H. Kingsland and Wesley Smith as the owners of five leases of the lots executed to them by the mayor, aldermen and commonalty of the city of New York, for the term of a thousand years, in pursuance of sales for unpaid taxes and assessments, and a nominal award of one dollar to Patrick Callaghan the owner of the fee.

It appeared that the award had first been made by the commissioners to Mr. Callaghan, and afterwards changed to unknown owners, and subsequently, when Mr. Kingsland and Mr. Smith presented their claims before them, they changed the award and made their report as above stated.

The report as first made, was examined by Mr. Callaghan and finding the award given to him, he went away to California, and he alleged that he had no notice that the awards had been changed.

It also appeared that a Mrs. Currie had in August, 1870, commenced an action of ejectment claiming that she was the owner in fee of three of the lots, in which action the mayor, aldermen, &c., Mr. Kingsland and Patrick Callaghan were made defendants.

T. J. GLOVER, *counsel for Mr. Callaghan.*

HENRY PARSONS, *counsel for Mr. Smith.*

ABRAHAM R. LAWRENCE, Jr., *counsel for Mr. Kingsland.*

DAVID J. DEAN, *for the mayor, aldermen, &c.*

BRADY, J.—The proceedings in reference to improvements under which the assessments and awards were made and imposed in regard to the Morningside Park, are regulated entirely by statute.

It is provided that when the report of the commissioners is presented to this court for confirmation, after hearing any matter which may be alleged against it, it is either to be confirmed or sent back to the commissioners for revisal or correction, or to new commissioners to be appointed by this court to reconsider the subject matter thereof.

And the commissioners to whom the report shall be so referred, shall return the same corrected and revised, or a new report to be made by them in the premises to this court, without unnecessary delay, and the same on being returned shall be confirmed or again referred back as right and justice shall require. And so from time to time, until a report shall be made or returned in the premises which this court shall confirm; but such report when so confirmed shall be final and conclusive, and the mayor, aldermen and commonalty shall become and be seized in fee of all the lands, tenements, and hereditaments in the report mentioned, (*Section 178, act of 1813, Valentine's Laws, 1198.*)

By the provisions of the act of 1862, *Laws, 966, Valentine's Laws, 1252*, it is the duty of the commissioners to deposit with the street commissioner an abstract of their estimate and assessments at least forty days before their report shall be presented for confirmation. It is also their duty to publish a notice for thirty days in two of the daily newspapers published in this city, stating the intention to present their report for confirmation to this court, at a time and place to be specified in the notice, in order that all persons interested in such proceedings, or in any of the lands affected thereby having objections thereto, shall file the same in writing with the said commissioners within thirty days after the first publication of such notice, and further, that they will hear such objections within the ten week days next after the expiration of the the thirty days during which publication is to be made.

After considering the objections, if any, and making any correction of their estimate or assessments which they shall

find to be just and proper, they shall present their report to the court at the time and place specified in the notice already referred to.

It thus appears that the proceedings are regulated by statute, as already suggested, and the power of this court defined.

The report may be sent back as often as this court may deem proper, before it is confirmed or new commissioners appointed—as often as may be deemed just—in order that the rights of all parties may be protected and a proper report obtained.

It is for the commissioners to make, however, the alterations or corrections in accordance with the principles laid down by this court for their guidance.

The court cannot make them directly, but if there be any doubt about this proposition, there is none in my judgment that the power if possessed, must be exercised before the report is confirmed.

When it is confirmed, the commissioners no longer exist. The advertisement of the intended presentation of the report of the commissioners and the right to present objections during a period of thirty days, which the commissioners must consider and act upon, are designed not only to give all persons interested in the lands affected, the opportunity to guard their interests by calling the attention of the court to the act or omission complained of, but to advise this court whether in the performance of their duties, the commissioners have acted illegally or oppressively, or have made a mistake, error or miscalculation to be shown by the objections presented.

These provisions are full and ample for the object in view, and from their comprehensive and conservative character, in the absence of any expression to the contrary, indicates very clearly that it was the intention of the legislature to make the confirmation of the report of the commissioners as they have declared it shall be, final and conclusive in reference to

Matter of Commrs. of Central Park.

their proceedings as between the commonalty of New York, and all persons whomsoever in reference to the land taken and the estimate and assessment made and imposed. All persons are thus advised that being given the opportunity to be heard, they must appear, and by objection either to the commissioners or submitted to this court, protect whatever rights are invaded or jeopardized.

The applicant does not seem to have presented any objection either to the commissioners or to the court.

It may be said that the award having been made to him in the first instance, he was justified in relying upon that entry, and the abstract of the report; but such a course of conduct was erroneous. The object of notice of publication would be defeated if the abstract could not be altered, and it was the duty of the applicant to see, if he meant to rely upon it as originally prepared, that it was not at the instance of any subsequent claimant having even an apparent title, altered to his prejudice.

The alteration or correction may be made according to the statute, (*supra*), at any time before the report is presented to the court after publication, and in this case, the alteration appears to have been made at the proper time.

There is no evidence of its having been made subsequent to its presentation, although, however, the report having been confirmed, is final and conclusive as already stated, in regard to the estimates and awards, it is not conclusive upon the rights of claimants *intersese*. The act of 1813, (*supra*), provides that an action may be brought against the person to whom the award was given, after payment thereof to him by the person to whom of right the money paid belonged, notwithstanding such report. This application must be denied, therefore, upon the ground that the confirmation of the report was final, conclusive, and the end of the proceeding. That the commissioners are *functus officio*, and that this court has not the power to alter the report or send it back to the commissioners for correction.

The applicant is not, however, without remedy. He can by action accomplish the object of this application, and by the interposition of the equity power of this court, successfully protect his rights, if it be as alleged that the lease executed by the city authorities on the sale for taxes was a nullity.

In the view thus presented of the question involved, it is not necessary to consider whether the commissioners were right in recognizing the lease presented and changing their award, but nevertheless, I think it was sufficient to justify them. (*Masterson* agt. *Hoyt*, 53 *Barb.*, 520.) Although, when there are adverse claimants, it is the proper and the better course to award to unknown owners.

Ordered in accordance with the conclusions stated.

Park agt. Morris Axe and Tool Co.

SUPREME COURT.

JAMES PARK, Jr., and others, agt. THE MORRIS AXE AND TOOL COMPANY.

The plaintiffs were manufacturers of steel, and the defendants were manufacturers of axes. Plaintiffs wrote to defendants a letter, in which they offer to sell them ten tons of best cast steel, which they would warrant equal in quality to any brand of English cast steel. Defendants ordered the amount sent to them, which they made into axes, which proved to be of inferior quality, by reason of the inferior quality of the steel.

Held, that the referee was justified in finding a warranty that the steel would make as good axes as the best English steel.

The name of the defendant's company was "Axe and Tool Company." This was notice to the plaintiffs of the use to which the steel was to be applied, and the warranty must be held to be that the steel would make either axes or tools of as good quality as the best English.

In this class of warranties the *measure of damages* is the difference between the value of the defective article, made from the defective material furnished, and the value of the article, if made from the material as represented.

In other words, the measure of damages in this case, would be the difference in value between the axes made from the defective steel, and their value if the steel had been equal to the best of English steel.

General Term, Fourth Department, January, 1871.

Before MULLIN, P. J.; JOHNSON and TALCOTT, Justices.

THE plaintiffs brought suit to recover upon two promissory notes given by defendants for the purchase price, in part, of ten tons of axe cast steel. The defendants set up a counter-claim of \$3,000 damages, for breach of warranty of the quality of the steel.

The defendants recovered judgment against plaintiffs to the extent of \$3,000, less the notes, and plaintiffs appealed to the general term.

The facts are sufficiently stated in the opinion of the court.

Park agt. Morris Tool and Axe Co.

BISSELL, POST AND POOR, *attorneys for plaintiffs.*

HUNT AND GREEN, *attorneys for defendants.*

By the court, MULLIN, P. J.—The plaintiffs were manufacturers of steel at Pittsburgh, in the state of Pennsylvania, and had an office in the city of New York. The defendants were manufacturers of axes at Baldwinsville, in this state. On the 25th April, 1868, the plaintiffs wrote to defendants a letter, in which they offer to sell them ten tons of best axe cast steel, which they would warrant equal in quality to any brand of English cast steel.

On the 31st July, 1868, the defendants' reply to the foregoing letter, in which they say, they are going to try and use plaintiffs' steel—that which they had used, worked very well, and ordering ten tons of certain sizes to be sent, two and a half tons per month, the first installment to be sent by the 15th August.

On the 3d August plaintiffs' acknowledged the receipt of defendants' letter, and in a postscript to their letter say, we will warrant ours to be equal in quality to Jessup's or any other standard brand.

Ten tons of steel were sent forward to defendants and made into axes, which proved to be of inferior quality, by reason, as the defendants allege, and as the referee finds, of the inferior quality of the steel.

The referee has allowed as damages, the difference in value between the axes made from plaintiffs' steel, and axes made from the best quality of English steel.

The plaintiffs insist that this rule of damages is erroneous, and that the defendants were entitled to the difference between the price paid and the market price of the best English steel. The principal question on this appeal is, is the measure of damages adopted by the referee the correct one? If not, the judgment must be reversed and new trial granted.

Parsons in his work on *Contracts* (1 Vol., 469), says, if a

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thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose.

The plaintiffs were manufacturers, and the defendants ordered the steel for the purpose of being made into axes. The case is thus brought within the principle asserted by *Parsons*, and the referee was justified in finding a warranty that the steel would make as good axes as the best English steel.

The name of the defendants' company was "Axe and Tool Company." This was notice to the plaintiffs of the use to which the steel was to be applied, and the warranty must be held to be that the steel would make either axes or tools of as good quality as the best English.

The case of *Jones agt. Bright* (5 *Bing.*, 533), is almost identical in its facts with the one before us. There the defendant was a manufacturer and vender of copper, and the plaintiff applied to him for copper for sheathing a vessel, the defendant replied he would serve him well. The copper was received by plaintiff, put on his vessel, but proved to be defective by reason of some latent defect, and it was held there was an implied warranty that the article was fit for the purpose for which it was sold.

In this class of warranties the measure of damages is the difference between the value of the defective article made from the defective material furnished, and the value of the article if made from the material as represented. (*Passenger agt. Thornburn*, 34 *N. Y.*, 634; *Milburn agt. Belloni*, 39 *N. Y.*, 53).

In other words the measure of damages in this case, would be the difference in value between the axes made from the defective steel and their value if the steel had been equal to the best English steel. This is the rule applied by the referee.

It is insisted by the plaintiffs' counsel that the defendants persisted in making axes from plaintiffs' steel after it was

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ascertained that the steel was of bad quality, and that they ought not to be allowed damages after such notice.

I agree with the counsel in his proposition, but it does not appear by the evidence that the defendants did persist in making axes after they knew of the bad quality of the steel. The only evidence I find on the subject is that one of the witnesses, who says he tried one of the axes in January or February, 1869, and found it defective. They commenced making from plaintiffs steel in December, 1868, and made up the whole quantity in four months.

Defects in a single axe, or even 100 axes, would not, it would seem from the evidence, be conclusive evidence that the steel was of bad quality, as it appears that large numbers made from the best English steel proved defective and were returned.

There is no date before us, nor was there any before the referee that enabled him to find that the defendants manufactured axes after notice that the steel was unfit for the purpose.

None of the objections taken by plaintiffs' counsel to the admission of evidence were well founded; the judgment must be affirmed.

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SUPREME COURT.

HENRY DAILY, Jr., plaintiff, agt. JANE AUGUSTA KINGON,
defendant.

Where an action is commenced and at issue, to *foreclose a third mortgage* on premises, the mortgagor cannot, on motion, stay the mortgagee's proceedings, on the ground that a judgment of foreclosure on the first mortgage (which last action of foreclosure was commenced simultaneously with the other action), made it necessary for the mortgagee in the third mortgage to seek his remedy against the surplus moneys on the first mortgage. The third mortgagee had a right to have the issue in the action tried.

Kings County Special Term, March, 1871.

THIS was an action to foreclose a mortgage made by the defendant, to secure the sum of \$7,500, which plaintiff had loaned her. Prior to this mortgage, there were two other mortgages, and an action, to foreclose the first one, was brought simultaneously with this action, but before this action on the third mortgage came on for trial, a judgment of foreclosure and sale had been obtained on the first mortgage by the owner. The owner of the judgment on the first mortgage had advertised the premises for sale under his decree. On the day the present action was called for trial, the defendant's attorneys procured an order from his Honor, Justice GILBERT, requiring the plaintiff to show cause, on a day therein named, before a justice at a special term, why a stay of proceedings should not be granted the defendant in this action, until the sale of the premises in question, under the decree entered on the first mortgage, and why the plaintiff should not be precluded from trying this action, and why plaintiff should not be confined in his remedy to his application against any surplus moneys which might arise from

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the sale of the premises under the decree of foreclosure entered in the action to foreclose the first mortgage.

This order to show cause, embraced a stay of plaintiff's proceedings pending the hearing and decision of the motion, The motion came on for argument before his Honor, Justice GILBERT, sitting at special term.

DENNIS MCMAHON, *counsel for the defendant, and in favor of the motion.*

I. This is a motion made by defendant, mortgagor, to restrain the further prosecution of a foreclosure suit commenced by the plaintiff, the mortgagee on a third mortgage, until the sale on a previous suit against the same property, to which the plaintiff is a party, for the purpose of avoiding unnecessary trouble and expense.

II. As a complete determination of the rights of the parties can be had in the suit on the first mortgage, the present case comes within the reason of the rule which prevents a second suit being had between the same parties, for the same subject matter, and the plaintiff's proceedings may be stayed. See *3d. Abb. P. R.*, (377,) where the court enjoined a party to a suit pending therein from suing the adverse party in a foreign court, upon the same subject matter involved in the said suit, where the parties all resided in this state, the cause of action arose there, and the said suit could determine the whole proceedings. See also *3d How.*, 65, where a statutory foreclosure was enjoined until the termination of a previous foreclosure suit.

III. Courts of equity have the power to interfere on principles of convenience, to prevent litigation which is considered to be either unnecessary, and therefore vexatious, or else ill adapted to secure justice. (*Lord CHANCELLOR in 16 Beav.*, 279, 289; *Mutual Life Ins. Co. agt. Bowen*, 47 *Barb.*, 618.)

IV. The plaintiff will not be prejudiced by delay inas-

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much as, if he is on the present trial sought to be stayed, he will be obliged to give notice of sale which will bring it to about, the time the sale on the first mortgage was adjourned to.

V. The relief prayed for will relieve the already harrassed defendant, Jane Augusta Kingon, from a great deal of unnecessary trouble and expense, without impairing the rights of the plaintiff. (19 N. Y., 440.)

VI. There has to be a reference, about the disposal of the surplus moneys on the sale of the premises under the decree on the first mortgage, even if Mr. Daily is permitted to proceed in this case, inasmuch as there is a second mortgage, which is a prior lien to Daily's mortgage. On that reference, Mr. Daily's rights could be settled cheaply and expeditiously, and in the *Mutual Life Ins. Co. agt. Bowen*, (47 Barb., 618,) this court decided, that it not only has the power, but it is its duty to provide for the equitable distribution or disposition of the surplus moneys.

VII. In the action on the first mortgage, Mr. Daily was a party. By the practice of the court, it would have been improper for him to have interposed an answer setting up the mortgage, which he now seeks to foreclose, consequently, the decree in the action on the first mortgage is a bar forever to him, except so far as claiming his money under the foreclosure. (*Benjamin agt. The Elmira R. R. Co.*, 49 Barb., 441.) Now, if he could not set up his mortgage by answer, can he do indirectly by maintaining his foreclosure suit, that which he could not do directly. We submit not.

VIII. An order staying proceedings, is the proper remedy, whereas in the present instance, both suits are in the same court. (4 How., 350 ; 3 Code, R. P., 86 ; 11 How., 365.)

H. DAILY, *plaintiff in person, opposed the motion.*

1. The defendant in this action has interposed an answer

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to plaintiff's complaint, raising a triable issue. The plaintiff has an absolute right to have that issue tried. The defendant, still retaining her answer, cannot invoke the aid of this court for an order, restraining the plaintiff from trying an issue which she herself has raised.

2. When a defendant puts in an answer, raising an issue of fact, or of law, the plaintiff has an absolute right to have that issue tried, or disposed of in the course prescribed by law. And any order of this court restraining the plaintiff from exercising that right, or suspending this privilege, is a direct violation of the law regulating proceedings in actions of this nature.

3. It is claimed that the plaintiff in this action, can try the issue here, on a reference as to the surplus moneys which must be had after sale under the decree on the first mortgage. The defendant's counsel insists that a full determination can be had on such a reference, and that the referee appointed to ascertain the priority of the several liens, can determine also the issue raised by defendant by her answer. This cannot be done.

A referee appointed under the 76th rule of this court in proceedings to obtain surplus moneys, has no power to try the issue between the parties, but only to ascertain the *ownership, priority and amount due on the lien*. A referee in proceedings as to surplus moneys, can only go to this extent. (*Husted agt. Dakin*, 17 *Abb. Pr. R.*, 137, &c.; *King agt. West*, 10 *How.*, 336.)

II. It may be claimed that the owner of a senior mortgage can be compelled by a junior mortgagee, to sell the premises so as to realize surplus moneys for application on the junior mortgage. But this cannot be done. The owner of a senior mortgage with judgment of foreclosure and sale entered thereon, has sole control over his lien as against prior incumbrances made defendant in his action. He cannot, against his will, be compelled to sell to satisfy the liens of subsequent mortgagees on the ground that they were defend-

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ants in his action. (*Mechanics and Traders Institution agt. Roberts*, 1 *Abb. R.*, 381, &c.)

4. Among other grounds, the defendant asks the order of this court enjoining and restraining the plaintiff from trying the very issue she herself has raised, that the trial will make an extra expense for her, and that it is unnecessary. The defendant's answer makes it necessary to have a trial, and she having created that necessity, cannot be heard to say that she shall not pay the expense of her own act if she is unsuccessful.

III. The plaintiff's right to foreclose his mortgage by action, is a statutory right, and it cannot be suspended or prevented by the order of this court. The motion should be denied, with costs.

The motion was argued before Mr. Justice GILBERT, on the 6th day of March, 1871, and on the 9th of March, the justice denied the motion, and in his decision, *held*, that the plaintiff had a right to have the issue tried, and that a referee appointed in proceedings to obtain surplus moneys, could not try any issue raised by the pleadings. And that all such referee had power to do, was to ascertain the ownership, priority and amount due on the lien. An order was accordingly entered, denying defendant's motion, with \$10 costs.

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N. Y. COMMON PLEAS.

EDWARD H. GILLILAN, surviving partner, &c. agt. JAMES K. SPRATT.

Where *summary proceedings* are instituted by the landlord against the tenant, for holding over after the expiration of his term, and a trial is had and the whole case submitted to the justice for his decision, and thereafter the justice, on motion of the landlord *discontinues* the whole proceedings; such decision of discontinuance is no bar to an action brought subsequently by the landlord against the tenant for *rent and damages* for the use and occupation of the premises.

The principles involved as to the effect of nonsuits, discontinuances or withdrawals of actions, pending before justices of the peace, in cases tried and submitted to them upon the merits, within the time prescribed by statute for decision, have no application to such a case as this. *Per* ROBINSON, J.

General Term, March, 1871.

Before LOEW, LARREMORE, and ROBINSON, JJ.

APPEAL from a judgment rendered against plaintiff at special term.

By the court, LARREMORE, J.—This action was brought to recover the sum of \$900, being rent of premises No. 100, Liberty street, for the months of April, May and June, 1868.

By an indenture of lease between the parties, dated March 6, 1867, the premises in question were demised to the defendant by the plaintiff for the term of one year from May 1, 1867, at the yearly rent of \$3,600, payable monthly on the first day of each succeeding month. The lease, among others, contained the following covenant, that in case the building was required to be removed in consequence of the extension of Church street, then *from the time said building was ordered to be removed by the city*

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authorities, said lease should become null and void, and rent paid to that date. On the 30th day of December, 1867, proceedings were taken and an order duly made and entered by the supreme court at general term, confirming the report of commissioners of estimate and assessment appointed for that purpose, whereby it was ordered, that said premises would be required to be taken for the extension of Church street. On the 2d day of May, 1868, summary proceedings were instituted by the plaintiff, before Justice QUINN, to remove the defendant from said premises, for holding over after the expiration of the term without permission of the plaintiff. Issue was joined therein, and a trial had thereon, on the 7th and 9th days of May, 1868, when the whole case was submitted to said justice, who on the 19th day of May, 1868, on motion of the landlord in said proceedings, (the said plaintiff,) and without notice to the other party, discontinued the same.

The learned judge, before whom this action was tried, found as questions of fact, in addition to the summary proceedings above stated, the making, delivery and acceptance of said lease, the occupation of the premises therein described by the defendant, from May 1, 1867, to May 1, 1868, the continuance of such occupancy by him through the months of May and June, and until after the 1st of July, 1868, and that the value of the use of said premises from May 1, 1868, to July 1, 1868, was \$600, which added to the rent for the month of April 1868, is \$900, and that the interest on said several sums up to the day of trial was \$58 95, making in all \$958 95, no portion of which had been paid by the defendant to the plaintiff. He also found as conclusions of law, that the action of said Justice QUINN, in said summary proceedings, was an adjudication, and judgment in favor of the tenant therein, (the defendant in this action,) and was final and conclusive between the parties as to the subject matter of said action, and was a bar to the plaintiff's alleged right to recover rent

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or damages for the use and occupation of said premises, and thereupon dismissed the complaint, with costs. From the judgment entered on this decision, the plaintiff appeals.

It was held by the general term of this court, in December, 1869, in *Detmold* agt. *Drake, et al.*, (a case similar to the one at bar,) that until the opening of the street, the land appropriated therefor by the public authorities, cannot be employed by them for any other purpose than that contemplated and established by the report of the commissioners. In the meantime, from the date of the confirmation of said report until such opening is actually commenced, the owner of the building, (unless required to remove it,) can retain possession of it, and is entitled to all the benefits of such possession.

The parties hereto evidently contemplated such a contingency in relation to the premises in question, and provided in the lease thereof, that the same should become null and void, from the time the building was ordered to be removed by the city authorities.

There is no evidence before us that any order for such a removal was ever given, and it is fair to conclude that the defendant was not disturbed in his possession during the continuance of said lease. Besides, it appears affirmatively from the findings of the jury at the trial, that the defendant continued in the occupation of the premises until after July 1, 1868, and that the value of the unpaid rent therefor, up to that time, was \$900. It is not pretended that any claim for said rent has been made by any one, except the plaintiff, and I think, his right thereto unquestioned, unless the summary proceedings hereinbefore mentioned, constitute a bar to its recovery.

The proceedings referred to were taken May 2, 1868, and after said lease had expired by its own limitation, to dispossess the defendant herein as the tenant of said premises, *for holding over after the expiration of the term without permission of the landlord.* The defendant, by his counter-

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affidavit, denied that he thus held over, and also denied that plaintiff was his landlord, on the ground that the title to said premises was, by said order of the supreme court of December 30, 1867, vested in the mayor, aldermen and commonalty of the city of New York.

The question of rent was not raised, or at issue, upon the trial and consequently could not have been submitted to the justice for adjudication. The justice did not decide the case as submitted, but on application of the relator discontinued the proceedings.

We are asked to hold such action on his part to be a final and conclusive judgment in favor of the defendant. But what is the nature and effect of such an adjudication?

Is it thereby only established that defendant did not hold over after expiration of his term, and without permission? Or are all the averments in defendant's counter-affidavit, of which proof was offered on the trial, to be deemed *res adjudicata*? This would compel us to hold that the plaintiff was not entitled to the possession of said premises after the order confirming the report of the commissioners of estimate and assessment was made, when, as we have already seen in the case of *Detmold agt. Drake*, a directly opposite theory was maintained by the general term of this Court,

The cases cited to sustain the position of the respondent (*Hess agt. Beekman*, 11 Johns., 457; *Elwell agt. McQueen*, 10 Wend., 521; *Peters agt. Diossy*, 3 E. D. Smith, 115; *White agt. Coatsworth*, 2 Seld., 137; *Demarest agt. Darg*, 32 N. Y., 284), all proceed upon the theory that the judicial mind had acted upon the merits of the case as submitted, and giving expression to such action by a judgment or final determination. The defendant in *Hess agt. Beekman* "suffered judgment to be entered against himself for costs." In *Elwell agt. McQueen* the court say, "although he (the justice) may call his judgment a nonsuit, and enter it accordingly, if the record or minutes of the trial show it was rendered after the cause was submitted to him, and after he

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took time to deliberate, and not at the trial, it will be considered a judgment for the defendant, and will be a bar to any subsequent action."

It might be claimed that as the justice had no authority to discontinue said summary proceedings, that the same are still under advisement by him, and his decision thereon might be enforced. Whether this view be correct or not, it is evident that said justice, by allowing such discontinuance, plainly indicated that he had not passed upon the merits of the case, but intended to leave the parties in the same position as if no such proceeding had been instituted. To construe such action on his part as a final determination is to compel him, by implication, to do that which he never intended, but expressly disavowed. Nor are we to presume that the justice would have decided contrary to law, and as the whole case turned upon the question of ownership, as decided by this court in the case of *Detmold agt. Drake*, above referred to, it is fair to assume that if the justice had finally determined the matter, such determination would have been in accordance with the law as thus established. No review could have been had on a discontinuance of said proceedings, and if said action be regarded as final, the party concluded thereby is without remedy.

In the case before us, the question of rent was not raised or litigated, and as it appears that no final adjudication was intended, it would be a severe application of the rule, where the occupation of the premises and the value thereof, are conceded, to deny a recovery on the ground of a former adjudication in which the same merits were not involved, and especially when it appears that the greater portion of said rent was for a period of time after the expiration of the lease, and was claimed solely on the ground of the use and occupation by the defendant of the premises in question.

The judgment appealed from should be reversed, and a new trial granted.

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LOEW, J.—I concur that neither the summary proceedings to recover possession of the demised premises, by reason of the expiration of the defendant's term, nor the action of the justice in discontinuing the same, should be held a bar to plaintiff's right of recovery in this action, which was for rent and damages for use and occupation, and I therefore agree that the judgment should be reversed, and a new trial ordered.

ROBINSON, J.—I am of the opinion that the learned judge, before whom this cause was tried, erred in regarding the summary proceedings between the landlord and tenant, had before Justice QUINN, of any force or effect upon the rights of the parties, as presented upon the pleadings and evidence.

In those proceedings, instituted by the present plaintiff, for the purpose of dispossessing the defendant as his tenant, for holding over after expiration of the term, without his permission, the defendant denied the tenancy, or that he so held over after expiration of his term, and while admitting the original letting, set up that the plaintiff's title *had ceased and become vested* in the corporation of the city of New York.

The issue thus joined, came on for trial before the justice, and after the testimony was closed, the case was submitted to him for adjudication and decision, on the 9th of May, 1869, but before he had rendered any decision, and on the 19th day of May 1869, on motion of the landlord, (the plaintiff in this action,) and without notice to the other party (defendant,) the justice discontinued the proceedings.

Upon these facts the judge, who tried this cause, held that such action of the justice was in law an adjudication, and a judgment in favor of the defendant, which was final and conclusive between the parties, as to the subject matter, and a bar to plaintiff's right of recovery of rent accruing under the lease for the last month, or damages for the subsequent use and occupation of the premises, and has thus

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decided that, by such proceedings, the landlord's title was determined, and that the property and right of possession thereof, belonged in fact, to the corporation of the city of New York.

In the accompanying opinion, the decision is predicated upon certain *dicta* of the courts as to the effect of nonsuits, discontinuances or withdrawals of actions, pending before justices of the peace, in cases tried and submitted to them upon the merits, within the time prescribed by statute for decision. The cases of *Hess* agt. *Beekman*, (11 *Johns.* 457;) *Elwell* agt. *McQueen*, (10 *Wend.*, 521;) *Peters* agt. *Diossy*, (3 *E. D. Smith*, 115;) *Demarest* agt. *Darg*, (32 *N. Y.*, 284;) and *White* agt. *Coatsworth*, (2 *Seld.*, 137;) are referred to in this view of the case, and in support of the judgment.

The principle to be deduced from these cases (so far as it affects the question of *res adjudicata*,) seems to have originated in *Hess* agt. *Beekman*, and to have been founded on a strict construction of the provisions of the statute relating to courts held by justices of the peace, (1 *R. S.*, 388, § 2,) which required the justice, after having heard the proofs and allegations of the parties, *within four days thereafter to give judgment thereon agreeable to law and equity, with costs of suit*. In that case, the cause had been so tried and submitted, but within four days, the plaintiff *withdrew* his suit and suffered judgment to be entered against him "with costs," and the court held, on a new action for the same cause, that "the statute was imperative; that after hearing and examining the proofs and allegations of the parties, the justice within four days, *shall give judgment thereon*"; that "the parties, are not in court for any purpose, but to receive judgment," and that the maxim "*nemo bis debet vexari pro eadem causa*" was applicable. The judgment was held a bar to a new action for the same cause, and the court say, "the merits were fairly entered into and investigated and submitted to the justice. It best comports with the

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spirit and policy of the statute, to hold the plaintiff concluded."

The authority of this case, as a rule, governing proceedings in courts of justices of the peace has been followed or recognized in the other cases above cited, and its manifest spirit and intent is to discourage renewed litigation in such petty courts and to save parties from being harrassed about such small matters as were there cognizable, where the costs to be awarded, were so trivial, and inadequate an indemnity. for the trouble and expense of a second defense.

The consequences of such an adjudication, as to the withdrawal or discontinuance of such a suit within the four days allowed for decision, are inconsiderable, while its application is confined to the particular claim in suit, and merely results in preventing a second action from being brought for the *same* cause, but its inconvenience, if not injustice, will become apparent when in litigations between the parties on other claims, such a fiction of the law is to be assumed (contrary to the truth,) as an actual decision by the justice upon the merits, and the principle of *res adjudicata* deduced from it, held as decisive in other controversies that may arise between them, upon all questions of fact and of law, involved in the original action. The proceedings in question were merely discontinued; and were such that the justice could not render therein any formal judgment of "discontinuance." He, in fact, made no decision or *final determination* from which an *appeal* could have been taken by either party; yet, if his mere allowance of a withdrawal of the proceeding is to be held a judgment in law adverse to the landlord, it cannot be limited as an adjudication upon any particular issue, but must be regarded as determining all such as were necessary to uphold the judgment or were within the issues joined or tendered. Its application to the facts and circumstances of the present case, demonstrates the extent to which such a departure from the rule of the common law may work injustice. Here the landlord, in

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attempting, in summary proceedings, to remove his tenant for holding over the term without his consent, is met by an answer, that his title has become vested in the corporation of the city of New York, and although no eviction, disturbances or attornment to the new owner, is alleged, or was claimed on the trial, and the matters so set up by way of answer to his claim, constituted no defense; yet, the proceedings instituted by the corporation of the city of New York, under the act of 1813, relating to the opening of streets in said city, and the order of the supreme court confirming the report of the commissioners of estimate and assessment therein, by which the property in question was taken, and damages awarded the plaintiff therefor, being simply shown and the justice, after *nine* days delay and failure to render any decision, having, on motion of the plaintiff, and without notice to the defendant, discontinued said proceeding, such *non-action* or *discontinuance* is to be held as having operated as an adjudication, rendered by the justice, upon the facts so at issue, adverse to the plaintiff's title and right of recovery against his tenant for rent, for use and occupation.

Such a defense has been held by this court in *Detmold* agt. *Drake and another* as unavailable to the tenant until the corporation has taken possession, and the same doctrine is maintained by the superior court, in *Strang* agt. *N. Y. Rubber Co.*, (1 *Sweeny*, 78,) but the construction given to this result or discontinuance of the summary proceedings, as determinative of the question at issue, renders it, however erroneous, conclusive as to all matters of fact or of law that were, or ought to have been proved or presented, by way of answer, to the defense, thus assumed to have been successful. (2 *Smith Lead. Cas.*, by *Hare and Wal.*, 6 *Am. Ed.*, 809, 810.) I am of the opinion that such application of the decision in *Hess* agt. *Beekman*, and those recognizing it, cannot be held decisive or as affecting this case.

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1st. At common law, the discontinuance of any suit or proceeding, is no bar to a new action for the same cause. (*Cockroft agt. Smith*, 11 *Abb.*, 62; *Earl agt. Campbell*, 14 *How.*, 330; *Hull agt. Blake*, 13 *Mass.*, 155.)

Upon such discontinuance, the only remaining right of the defendant is to be paid his costs, and, if the plaintiff neglects to do so, then the defendant may go on with the suit, and proceed to judgment for their recovery. (*James agt. Delevan*, 7 *Wend.*, 511; *Huntington agt. Forkson*, 7 *Hill*, 197; *Hicks agt. Brennan*, 10 *Abb.*, 304; *Averill agt. Patterson*, 10 *N. Y.*, 502.)

A justice of the peace, however, was authorized, by the twenty-five dollar act, (1 *R. S.*, 393,) in case the plaintiff was nonsuited, or discontinued or withdrew his action without defendant's consent, to award judgment for costs, against him, and so also by the \$50 act of 1824, *ch.* 238, § 14, and by 2 *R. S.*, 246, § 119. But the justice loses jurisdiction, and the action becomes discontinued, if he adjourns the cause or defers action in any other manner, than such as is specially pointed out by the statute regulating his proceedings. (*Kimball agt. Mack*, 10 *Wend.*, 497; *Thompson agt. Sayre*, 1 *Den.*, 175; *Wilcox agt. Clement*, 4 *Den.*, 160; *Weeks agt. Lyon*, 18 *Barb.*, 538; *Aberhall agt. Roach*, 11 *How.*, 95; *Wright agt. McClave*, 3 *E. D. Smith*, 316.) So to, if he fails to render judgment "forthwith," on the day of trial in case of nonsuit, discontinuance, withdrawal and confession, and on the rendering of the verdict of a jury, (*Sibley agt. Howard*, 3 *Den.*, 72; *Beattie agt. Qua*, 15 *Barb.*, 132,) and in all other cases within four days after the case is submitted to him for final decision. (*Watson agt. Davis*, 19 *Wend.*, 371; *Young agt. Rummell*, 5 *Hill*; 60, *S. C.*, 7 *Hill.*, 503; *Bissell agt. Bissell*, 11 *Barb.*, 96; *Wiseman agt. Panama R. R. Co.*, 1 *Hill*. 300; *Bloomer agt. Merrill*, 1 *Daly*, 485,) or where he has held the case open for twenty-four hours, to enable a party to procure his witnesses, (*Green agt. Angel*, 13 *Johns.*, 469,) so by failure of the plaintiff, to appear

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before a verdict rendered by a jury; or on being called on the coming in of the jury, a verdict could not be received and a nonsuit must be rendered. (*Platt agt. Storer*, 5 *Johns.*, 346; *Shove agt. Raynor*, 3 *Den.*, 78; *Douglass agt. Blackman*, 14 *Barb.*, 381.) In this court, the principles of *Hess agt. Beekman*, have been held not to apply where the time reserved by the justice for his decision was upon a motion for nonsuit, (*Seaman agt. Ward*, 1 *Hilt.*, 52,) and its application to actions in the marine court of this city, has been repudiated by the supreme court, in *Dexter agt. Clark*, 35 *Barb.*, 271.)

The justice before whom the summary proceedings in question were instituted was, by the act of 1857, chap., 344, § 47, allowed in actions pending before him, eight days after the trial of the action to render his decision; but neither that act nor any of the provisions relating to actions before justices of the peace, have any reference to the special proceedings, instituted by landlords to recover possession of lands.

In the statute relating thereto, (2 *R. S.*, 512, &c., as amended by the acts of 1849, chap. 193, of 1851, chap., 460, and of 1857, chap. 684, 3 *R. S.*, 5th ed., 835,) the magistrate before whom it is pending, (by 2 *R. S.*, 515, § 41,) is authorized "upon request of either party, to adjourn the hearing of such application for the purpose of enabling such party to procure his witnesses, whenever it shall appear to be necessary, such adjournment shall in no case exceed ten days." And he also is allowed, under certain circumstances, to stay the issue of the warrant of removal for ten days, (3 *R. S.*, 5th ed. 831, § 44.)

Previous to the enactment of the 41st section, above quoted, it had been decided, in *Nichols agt. Williams*, (8 *Cow.*, 13,) that under the statute giving summary means to landlords to oust tenants wrongfully holding over. (*Laws of 1820*, chap. 194, substantially re-enacted in 2 *R. S.*, 513, &c.,) the judge or justice before whom the proceeding

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was pending, had no power to adjourn it, and this 41st section was intended "to supply such omission." (*Rev. Notes*, 3 R. S., 2d. ed. 766,) and to relax the stringency of the rule referred to, to such extent as the legislature deemed necessary.

No time, however is, in express terms, prescribed or allowed by statute to the magistrate, beyond the day of trial, within which he shall render his decision. None of the various magistrates, (2 R. S., 513, § 28,) before whom the proceeding can be had, (except justices of the peace, by the act of 1849, chap. 193, § 6,) are required to make entry of their decision and, although the statute contemplates some time to ensue between the decision and the issuing of the warrant, unless the very day of the trial be regarded as the day for such decision there is no certain mode for calculating the period of ten days, allowed for a stay of the warrant by the act of 1857, chap. 684, § 4, (*Watson agt. Davis*, 19 *Wend.*, 37.) The magistrate is not authorized as in the justice's court act, to render judgment of "non-suit, discontinuance or withdrawal of plaintiff's action." (2 R. S., 246, § 19, *sub.*, 1.) Although for defect in the landlord's application or proofs, he may undoubtedly dismiss the proceedings. If, upon the merits, his decision is favorable to the landlord, he is required to issue his warrant of removal. The proceedings before him are made by statute "summary," and present the sole question whether or not the tenant shall "forthwith" remove from the premises. (2 R. S., 513, § 30.) The provisions authorizing an adjournment or postponement, for periods not exceeding ten days in each of the cases referred to, are specific, and under the ordinary rules of construction, the maxim, "*expressio unius est exclusio alterius*," is applicable and having regard to the character of the proceeding, a further or other postponement or adjournment would seem to have been contrary to the contemplation of the legislature.

Courts of special and limited jurisdiction take nothing by

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implication (*Loomis* agt. *Bowers*, 22 *How.*, 361), and in analogy to the strict construction held as to the powers of this magistrate, while acting in the determination of actions pending before him, and applicable to all officers of special and limited jurisdiction, and upon the considerations above presented, the indefinite postponement of the proceeding in question, for purpose of deliberation and decision, was equally unauthorized, and the delay to make a decision for nine days, was as unjustifiable as if he had so delayed it for nine weeks, months, or years; and, in my opinion, after such submission, the postponement ousted him of all jurisdiction. But were this otherwise:

2d. There was in this proceeding, no such Procrustean rule, as in *Hess* agt. *Beekman*, impounding the parties for "four days," or any other specified period, nor can the allowance, by the magistrate, of its discontinuance, on motion of the plaintiff, on the tenth day after submission be, by any reasonable fiction of law, held to be a *decision* in favor of the tenant, that a warrant ought not to have issued, for the reason stated in the tenant's affidavit, or as determining on the merits the questions presented on that hearing.

There is no principle of statute or common law (except so far as it has found countenance in the before-mentioned strict construction of the justice's court act) which prevents the plaintiff or prosecutor, in any civil suit or proceeding instituted by him, from withdrawing or discontinuing it, prior to any decision rendered against him.

Whether such action or proceeding be at law or in equity in bankruptcy, insolvency, in proceedings for the opening of streets, or other statutory proceedings, or in arbitration, &c., until some adverse right has been legally decided and established against him, he has always been held as possessing a "*locus pœnitentiæ*," and entitled to abandon or withdraw the prosecution of his claim, whether it was *subjudice*, as question of fact, before a jury, or under advisement be-

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fore a magistrate or other tribunal, deliberating upon the law, or in exercise of the functions of a jury as to the facts, subject only to the payment, to his adversary, of any such costs as the law imposes.

The peculiar rights of a defendant who has set up a counter-claim, to insist upon a continuance of the action, forms no exception. The rule of the supreme court, No. 47, adopted 1845 (now No. 32), prohibiting the plaintiff from submitting to a nonsuit, after the jury has gone from the bar to consider their verdict, is but one of practice, and certainly would not, under the rule of construction contended for, give a like effect to any discontinuance allowed, while the jury were deliberating and in contravention of the rule, as to a verdict.

The principles announced in *Hess* agt. *Beekman*, made applicable to proceedings in justice's courts, ought not to be extended and, in the present case, they were misapplied.

The proceeding before Justice QUINN could, in no sense, be held or regarded as decisive of the rights of the plaintiff, as landlord of the defendant, or his claims as stated in the complaint. The matters set up in the answer showing no eviction or attornment, presented no substantial defense, and the judgment should be reversed and a new trial ordered with costs to abide the event.

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SUPREME COURT.

JOHN G. McMURRAY agt. CAROLINE A. McMURRAY and others.

The neglect to serve on *infant defendants* in a mortgage foreclosure case, copies of an *amended complaint*, is a great irregularity. But where too much time has elapsed and too many innocent parties are interested, the judgment will not be disturbed on that ground.

The want of appointment of a *guardian ad litem* for infant defendants in such a case, renders the judgment of foreclosure *erroneous*; and it may be set aside, on motion, as a matter of right.

But where the infant defendants could severally have moved to set aside the judgment as soon as they came of age, but delayed respectively about nine, seven and four years, *held*, that innocent parties ought not to suffer by the delay. Motion denied, without prejudice to the right of the moving parties to bring an action of ejectment, or by an action to redeem, in order to test their claim to set aside the judgment of foreclosure as being absolutely *void*.

Troy Special Term, October, 1870.

MOTION to set aside a judgment in foreclosure with all proceedings subsequent to service of the summons.

BANKER & RISING and BEACH & SMITH, *of counsel for Charles D. McMurray, Frances E. McMurray and Mary A. McMurray, for the motion.*

MR. HYATT, *of counsel for plaintiff*; MR. TOWNSEND, *of counsel for Lucius Wright et al.*; TRACY & PECK, *of counsel for Wm. Allendorf et al.*; MCCLELLAN & LANSING, *of counsel for Jacob Shaver et al.*; MR. BALL, *of counsel for Martha E. Ball et al.*; MR. QUACKENBUSH, *of counsel for Mary E. Williams*; MR. LAWTON, *of counsel for Anthony Lawton; opposed.*

LEARNED, J.—The papers in this motion are voluminous;

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but the facts on which the decision must turn are few and simple.

About Dec. 1, 1860, the plaintiff commenced the action above entitled, for the purpose of foreclosing a mortgage given by Robert D. McMurray, then deceased, on land in Troy. The land was 180 feet wide, front and rear. At the time of the commencement of the action, Charles D. McMurray, Frances E. McMurray and Mary A. McMurray were seized in fee, in remainder, each, of an undivided fourth of three undivided fifth parts of the equity of redemption in a part of the mortgaged premises, being 128 feet, front and rear; on which Mrs. Caroline A. McMurray had a life estate for her own life.

Frances E. was born July 5, 1840; Charles D. was born October 31, 1842, and Mary A. was born March 14, 1845; and at the time of the commencement of this action they were, therefore, all infants. The summons and complaint were served as follows: on Frances E. July 27, 1860, and on Charles D., July 27, 1860, Mary A. not being then a party to the action. Subsequently, in December, 1860, the summons and complaint were amended by adding Mary A. and others as parties and by inserting in the complaint new allegations as to the contents of the will of the mortgagor, and the amended summons with notice of object of suit was served on Mary A., January 31, 1861. No service of the amended summons or complaint was made on Frances E. or Charles D.

No guardian *ad litem* was ever appointed for any of these infants, and they did not appear or answer in the action by guardian or otherwise.

On the 30th day of March, 1861, an order of reference to compute the amount was granted, which did not require the taking of proof of facts or the examination of plaintiff as to the payments, and thereupon, on the same day, the usual judgment of foreclosure and sale was taken and the roll filed. The property was sold under the same, about

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April 22, 1861; Frances E., Charles D. and Mary A. being still infants.

The referee's report of sale cannot be found. By his deed it appears that the mortgaged property was purchased by the plaintiff on the sale, for \$14,000.

The judgment was for \$10,966 37 due on the mortgage; with \$301 51 for taxes, and \$167 15 costs, all of which, with interest and expenses, amounted on the day of sale to \$11,475 38.

Subsequently, the plaintiff having thus obtained the title, sold the premises, and by successive conveyance they have come to be held in severalty by a number of persons, not parties to the action, but served with notice of this motion. The mortgaged premises are now divided into eight city lots. The 128 feet in which Frances E., Charles D. and Mary A. had an interest, take up five of these lots and a part of another. All of these eight lots have been built upon at an expense in the aggregate of over \$30,000. This building was commenced in the spring of 1863, and continued about a year, and partly from these improvements, and partly from the prosperity of the city, the lots have greatly increased in value since the sale under the foreclosure.

It is not claimed that the present owners of these lots had any actual knowledge of the alleged defect in their title, and on the other hand, it is averred that the moving parties, Charles D., Frances, E. and Mary A. must have seen and known of the improvements as they were put upon these lots.

Caroline A. McMurray died March 10, 1869, and the moving parties, up to that time, were under the belief that they could not assert any rights which they had in the property until after her death.

One other fact may be mentioned which is not, perhaps, very material. Before the foreclosure suit was commenced, the plaintiff, John G. McMurray, bought from the executrix of the mortgagor, (she having a power to sell,) the 52 feet

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part of the mortgaged premises, in which the moving parties have no interest. He did not put the deed on record until 1870, and has proceeded in the foreclosure without regard to this purchase. The whole of the mortgaged property was sold by the referee and purchased by the plaintiff.

There is some conflict of testimony whether the lots did or did not sell for their full value; and some question whether, as would seem from the deed, they were sold in one parcel or in several. But these are matters which cannot come up on this motion. Yet, I may say, in passing, that from this unrecorded purchase of the 52 feet; from the want of the proper order of reference to take proof of the facts and to examine the plaintiff as to the payments; from the selling of the property in one parcel; from the payment of the surplus of \$2,524 62 to the executrix of the mortgagor and not to his devisees, (some of whom are these moving parties;) from the repayment of that surplus by the executrix to the plaintiff, I am led to think that the interests of these moving parties actually suffered by the want of a guardian *ad litem*.

The questions to be settled here are:

1. Is the want of a guardian *ad litem* a mere irregularity, or does it render the judgment erroneous or void?
2. Is the remedy asked in this motion the proper relief?
3. Is the motion made in time?

There is a defect in the judgment not referred to in the motion, but apparent on examination of the roll. The amended summons and complaint were not served on Frances E., or Charles D. Now it is said in the case of the *People* agt. *Woods* (2 *Sandf.*, 653), that a judgment thus obtained is irregular and must be set aside. It by no means follows, says Judge SANDFORD, because the defendant did not defend the original complaint, that he was not desirous to answer the complaint amended. The Code provides (§ 146), that if the complaint be amended a copy must be served on the defendant, and the right to answer is a sub-

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stantial right. (*Low* agt. *Gray and others*, 14 *Abb.*, 444.) The neglect to serve on these two defendants was, at the least, a great irregularity. But too much time has elapsed and too many innocent parties are interested for the judgment to be disturbed on that ground.

I proceed to examine the question as to the effect of the want of a guardian *ad litem*. And here it should be observed that the position of an infant defendant is different from that of an infant plaintiff. There are several cases in which an adult defendant has sought to set aside proceedings on account of neglect in the infant plaintiff to procure the appointment of a guardian *ad litem*. Such are the cases of *Rutter* agt. *Ruthofer* (9 *Brow.*, 638); *Fellow* agt. *Niver* (18 *Wend.*, 563); *Parks* agt. *Parks* (19 *Abb.*, 161); cited by the counsel opposing this motion. But these cases do not touch the point involved here. They are cases in which the defendant, by pleading to the merits, had waived the defect in the plaintiff's proceedings. This is pointed out in *Fairweather* agt. *Satterly* (7 *Robt.*, 546).

The infant plaintiff comes voluntarily into court. If he comes irregularly the defendant should object promptly. By pleading in bar under the old practice, or answering generally, under the present, the defendant omits to object and waives the defect.

But an infant defendant is differently situated. He is brought into court without his consent, and the plaintiff claims some relief against him. He must defend his rights or by his silence admit the plaintiff's claim. He cannot appoint an attorney to appear for him. Indeed, he may be an infant, in the ordinary meaning of the word, and incapable of acting. Therefore, it is that the law has provided him a protector, and therefore the plaintiff, if he would have relief against the infant, must see, at his peril, that this protector is appointed.

The Code (§ 115), says that when an infant is a party he must appear by guardian. This is no new provision; and

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the old authorities will therefore shed light on the effect of disregarding it.

In *Mackey* agt. *Gray* (2 *Johns.*, 192), it was held to be error for an infant to appear by attorney; and the same doctrine is held in *Alderman* agt. *Tirrell* (8 *Johns.*, 418).

In *Bliss* agt. *Rice* (9 *Johns.*, 160), it was held to be error for an infant to appear in person and not by guardian.

In *Hillyer* agt. *Larzelere* (9 *Johns.*, 160), a judgment by default against an infant in an action of dower was set aside because no guardian *ad litem* had been appointed.

In *De Witt* agt. *Post* (11 *Johns.*, 460), a verdict had been rendered against an infant defendant, who had appeared by attorney. On writ of error the judgment was recalled for this error in fact.

For an infant to appear by attorney and not by guardian, was again held to be error in fact, in *Arnold* agt. *Sandford* (14 *Johns.*, 417); and in *Camp* agt. *Bennett* (16 *Wend.*, 48).

In *Comstock* agt. *Carr* (6 *Wend.*, 526), an infant defendant appeared by attorney and obtained judgment of *non pros*. The judgment was set aside. To the same general effect is *Gosling* agt. *Acker* (2 *Hill*, 391).

It will thus be seen that by a uniform series of decisions under the former practice, judgments against infants were set aside, reversed or recalled for error in fact, on the ground that no guardian *ad litem* had been appointed. The remedy in the supreme court was by writ of error in fact. That has been abolished by the Code; but we shall find the same general principles enforced in other ways.

The first case is that of *Kellog* agt. *Klock* (2 *Code*, *Rep.*, 28), where a judgment against an infant was set aside for the want of a guardian *ad litem*; the infant's counsel arguing that, as the writ of error was abolished and as an appeal did not lie from a judgment by default, a motion to set aside the judgment was proper. With which opinion the court seem to have concurred.

In the case of *Boyle* agt. *McAvoy* (29 *How.*, 278), the

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plaintiff had a verdict against the defendant, who had appeared by attorney, but who, at the time of the trial was four months under twenty-one years. Judge JOHNSON says of the appearance of an infant by attorney, that it was an error of fact for which a judgment would be reversed or set aside. It was never curable by the statute of jeofails and cannot be obviated in this way (referring to the motion then made by the plaintiff), against the defendant's objection although he is now of age. He may, if he chooses, waive the irregularity, but the court cannot compel him to abide by his answer and the trial under it, if he elects not be bound. The statute and the rules of practice which require an infant to appear by guardian *ad litem*, had a substantial object in view, the protection of such persons against what the law adjudges to be their own incompetency to choose attorneys or to conduct their own litigation with suitable prudence and discretion.

Our own statute of jeofails does not include this defect. By 2 *Rev. Stat.*, *marg. p.* 424 (§ 7, *sub.* 7), judgments in favor of an infant were not to be reversed because he appeared by attorney. We may infer from the silence as to judgments against him, that they were not thus protected.

The case of *Harvey* agt. *Large* (51 *Barb.*, 222), holds that a judgment in a justice's court against an infant, where no guardian *ad litem* is appointed, would be void.

In *Fairweather* agt. *Satterly* (7 *Robt.*, 546), a verdict had been rendered and judgment entered against an infant defendant who had appeared by attorney and answered. Judge JONES reviews the cases and says: "I am confirmed in the view which I took at the argument, that an infant cannot waive the objection that his rights have not been protected in the manner prescribed by law;" and the judgment was set aside.

It was strongly urged in opposition to this present motion, that this defect was a mere irregularity. The

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question as to what defects are merely irregularities was discussed in *Clapp* agt. *Graves* (26 N. Y., 418), in which the court quote with approval, the language of Justice COLERIDGE, in *Holmes* agt. *Russell* (9 Dowl., 487). "It is difficult, sometimes, to distinguish between an irregularity and a nullity; but I think the safest rule to determine what is an irregularity and what is a nullity, is to see whether the party can waive the objection. If he can waive it, it amounts to an irregularity; if he cannot, it is a nullity."

If this test be applied to the present case we are to ask, could these infants have waived this defect? I suppose they could not. So long as they were infants, (and they were infants until after the judgment), they could waive nothing. It is even the well-known doctrine that the guardian *ad litem* cannot, by his answer, admit the allegations of the complaint. The cases of *Fairweather* agt. *Satterly*, and of *Boyle* agt. *McAvoy*, both recognise this principle fully, that the infant defendant, while an infant, cannot waive the defect that he did not appear by guardian.

There is one case which needs some examination, that of *Croghan* agt. *Livingston* (17 N. Y., 218). The decision in that case was that the omission by the guardian *ad litem* to file his bond is a mere irregularity, and that the bond might be filed *nunc pro tunc*. This is all that the case decides. In the course of the opinion Judge PRATT says: "I apprehend that a case cannot be found holding that a judgment or decree, when they appeared by attorney would be void;" and further: "a failure, therefore, to provide this agent (a guardian *ad litem*), would not, it would seem, affect the jurisdiction of the court, but was matter of error;" citing *Austin* agt. *Charlestown Female Seminary* (8 Metc., 196). In this last mentioned case it was held, that the omission to appoint a guardian *ad litem* of an infant defendant, in a partition suit, did not make the judgment void, but

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voidable by writ of error ; that it could be avoided only by the infant or privies in blood, not by privies in estate ; and that a party to an erroneous judgment, who is not entitled to a writ of error, may avoid it by motion, or by plea in a court of competent jurisdiction. The case of *Rogers* agt. *McLean* (31 *How.*, 279), is substantially to the same effect with *Croghan* agt. *Livingston*, affirming the right of the court to amend the proceedings on which a guardian *ad litem* had been appointed. Neither of these cases involved, in any way, the effect of the want of a guardian, for in both a guardian had been appointed.

From this review of the cases there can be no doubt that it is not a mere irregularity to take a judgment against an infant defendant, without the appointment of a guardian *ad litem* for him. It is in the accurate language of the old practice, error in fact. The infant in some cases, could have the judgment reversed ; and in the case of a judgment in this court, it would be "recalled" by writ in the nature of a writ *coram nobis*, to be issued, not of course, but on application to the court. See *Ferris* agt. *Douglas* (20 *Wend.*, 626). And nothing that the infant could do during infancy, waived his right to this relief.

As has been before remarked, the writ of error is abolished. There seems to be no other mode of obtaining this relief than by motion to set aside the judgment. It is to be regretted that the old practice (or something similar) is not in force in this particular. For this relief is a matter of strict law and should properly be sought by strict forms and proceedings. While the papers on a motion like the present, inevitably bring up equitable considerations. The proceeding, in such a case, is not one which should be addressed to the varying discretion of the court. Such considerations as those of the increased value of the property, the knowledge of the moving parties that innocent persons were building, and the like, ought not to affect a question which should be one of strict law. And if such

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matters were to be considered, it would be necessary to remember, that although the occupants of these lands bought innocently, still they are chargeable with notice of their own title. They were bound to know that these moving parties had a fee in remainder and they were bound to see that such remainder had been barred. Indeed a hasty examination of the judgment roll would have shown the fact of infancy and the want of a guardian. But I think that this motion must be decided on the same principles as would have applied to the decision of the old writ of error, and not on the so-called equitable doctrines which prevail in motions addressed to the discretion of the court. And I am fully satisfied that if this motion is made within proper time, the judgment ought to be set aside as a matter of right.

It remains then to consider whether the moving parties have made their motion within the proper time. I have already said that the defect complained of is not an irregularity, so that the provision of the Revised Statutes limiting the time to one year does not apply (2 *R. S.*, *marg. page* 359, § 3). Nor does section 174 of the Code touch this case. And for the reason that this is not a mere irregularity, the parties are not bound to move at the earliest possible opportunity. Still there should be some limitation.

The moving parties severally came of age July 5, 1861, October 31, 1863, and March 14, 1866. They seem to have thought that they could not proceed to enforce their rights until the death of Caroline A. McMurray on the 10th of March, 1869. But this was a mistake. They could severally have moved as soon as they came of age, and they have, therefore, delayed respectively about nine, seven and four years. Innocent parties ought not to suffer from this mistake.

I regret that there is not, as there should be, some statutory limitation to the right to make such a motion. It would be intolerable that it should be allowed at any unlim-

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ited time after the judgment, even on showing the fullest excuse for delay. For in the course of time rights of new parties arise which ought not to be disturbed. And it is very objectionable that the time within which such a motion may be made should depend on judicial discretion. The feelings of judges vary. This variance may be endured in matters addressed to discretion; but it is very bad in matters of strict right.

In the present case, I do not think that the ignorance of their rights, stated by these moving parties, is such a complete excuse for delay, that they may make their motion whenever they learn what their rights are. They are bound to know their legal rights; according to the old maxim that ignorance of the law excuses no one.

Under the old practice, a writ of error (including the writ in the nature of a writ *coram nobis*), must have been brought within two years. If the party against whom the judgment was recovered were an infant, he might bring the writ within two years after coming of age. That time was liberal, and although I am not aware that, by any existing provisions, that limitation is legally applicable to this motion, still I do not think I shall be much astray if I follow the wisdom of former legislation. If these moving parties had sought their relief before the Code, they would have been strictly limited to the two years after they severally came of age. This limitation would have been entirely irrespective on the one hand of their knowledge or ignorance, and on the other of the acts of parties claiming under the judgment. (Although by this remark I do not say how the reversal of a judgment would affect a sale under it. *Holden agt. Sackett*, 12 *Abb.*, 473.)

I shall hold, therefore, both by analogy to the old writ of error, and also as my conclusion on the circumstances of this case, that the moving parties have not made their motion within such time as entitles them to the relief asked; and I shall deny the motion. They claim that the judgment

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is void. If they are correct in this, they may perhaps enforce their rights by ejectment or by an action to redeem. The denial of this motion therefore will be without prejudice to any action of ejectment, or to redeem the mortgage, or of any other action which these parties might otherwise lawfully bring.

Ten dollars costs of opposing the motion to be allowed to each of the several attorneys or firms who appeared.

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SUPREME COURT.

THE ROCHESTER WATER-WORKS COMPANY agt. JOHN WOOD.

The constitution, (*art. 1, § 7,*) provides that when private property shall be taken for public use, the *compensation* therefor, when not made by the state, shall be ascertained by a jury, or by not less than three commissioners, appointed by a court of record as shall be prescribed by law.

The provision in the charter of the Rochester Water-works Company, (*Laws 1852, §§ 8-11,*) which authorizes the *court* to increase or reduce the amount of damages reported by the three commissioners, for the taking of land for the use of said company, is *unconstitutional and void*.

When the constitution requires damages to be assessed, either by a jury of 12 men, or by three commissioners, it does not require argument to demonstrate that it cannot be done by one, nor by three or more judges of this or any other court.

It is competent to provide for an *appeal to the court*, in order to protect the parties against an imperfect appraisal; and upon that appeal the court can confirm or set aside the assessment, and correct irregularities committed by the commissioners or parties in the course of the proceedings; and this is the extent of the power possessed by the court.

The general term, on appeal, has the power and it is its duty to make such an order as the special term should have made in such a case.

In this case, the special term having reduced the amount of damages reported by the commissioners, the general term vacated that order, and remitted the case to the special term for the appointment of new commissioners to make the appraisal.

Fourth Department, January Term, 1871.

MULLIN P. J., JOHNSON and TALCOTT, JJ.

APPEAL from an order of special term reducing amount of appraisal of damages for land taken by the Rochester Water-works Company.

MULLIN, P. J.—The charter of the Water-works Company, (*chap. 356 of the Laws of 1852, § 8, 9, 10, and 11,*) provides that it may acquire title to real estate, for the purpose of its incorporation, and if it cannot agree with the owners of the land required, it may apply to the supreme

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court at any term thereof, held in the seventh judicial district, for the appointment of three commissioners by whom the compensation to be paid for the damages suffered or to be suffered by reason of taking land and water, and constructing any of the works of said company, shall be ascertained and determined; notice of the time and place of hearing before the commissioners is to be given to the owners of land, &c., and the commissioners are to hear the parties, and to report in writing the amount of damages ascertained and assessed by them.

The company, or any owner may appeal from the determination of said commissioners to the court, and upon the report and such further evidence as may be produced before it, the court may affirm the proceedings of the commissioners in whole or in part, or may increase or diminish the amount of compensation, and if the proceedings have been irregular, it may set them aside, and order new proceedings and appraisal, and it may make such orders in reference to the proceedings of the commissioners, and for notices to the parties as the nature of the case may require.

Under these provisions, the company procured three commissioners to be appointed to appraise the damages sustained by the defendant, Wood, by reason of the taking of a part of his lands for the purpose of laying therein its pipes, to conduct water from the Reservoir of the company to the city.

The commissioners after hearing the parties, assessed defendant's damages at the sum of \$900.

From this appraisal, the company appealed to this court, and on the hearing at the special term, additional evidence was given upon the question of damages, and the court reduced them to \$250, and confirmed the appraisal for that sum.

From that order, the defendant, Wood appeals.

The counsel for the company, concedes that the provisions

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of the charter authorizing the court to increase or reduce the amount of damages reported by the commissioners, is unconstitutional and void.

The consttution provides, art. 1, § 7, that when private property shall be taken for any public use, the compensation therefor, when not made by the state, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law.

It does not require argument to demonstrate the proposition, that when the constitution requires damages to be assessed either by a jury of twelve men, or by three commissioners, that it cannot be done by one, nor by three or more judges of this or any other court.

The legislature is entrusted with the discretion, to provide for appraisement by a jury, or by three commissioners, and it can provide for no other mode of assessment.

It was competent to provide for an appeal to the court, in order to protect the parties against an unjust appraisal, and upon that appeal, the court could confirm or set aside the assessment, and correct irregularities committed, by the commissioners or parties, in the course of the proceedings. And this was the extent of the power possessed by the court.

It is unnecessary to enter into an examination of the evidence. It is manifest that the damages are very large in lieu of the quantity of land taken, and of the use to which it is to be put. The court should have set aside the appraisal, and appointed new commissioners.

This court has the power, and it is its duty to make such an order as the special term should have made.

The order of the special term is therefore, vacated, and it is ordered that the appraisal of the damages by the commissioners be, and the same are, hereby set aside, and the proceedings are remitted to the special term, for the appointment of new commssioners. \$10 costs of the appeal allowed to appellant.

Lindsley agt. European Petroleum Co.

SUPREME COURT.

LEONARD B. LINDSLEY and ISAAC B. COTTRELL agt. THE
EUROPEAN PETROLEUM COMPANY.

Where an answer admits the making and delivery of a promissory note and sets up an affirmative defense, the affirmative is with the defendant who is entitled to open and close the case, and the refusal of the court to allow him so to do, is error, for which judgment will be reversed and a new trial ordered.

First District, General Term, January, 1871.

Before INGRAHAM, P. J., BARNARD and BRADY, JJ.

THIS was an action brought to recover the amount of thirteen promissory notes, made by the European Petroleum Company to the order of L. E. Lahens and indorsed by said Lahens to the plaintiffs.

The answer of the defendants was as follows: "The defendants came into court and answering the complaint of plaintiffs, admit the making, indorsement, transfer and delivery of the said notes, and deny the other allegations therein contained," and then proceeded to set forth an affirmative defense.

Upon the trial before a referee, the defendants' counsel proposed to open the case, and insisted on his right so to do, on the ground that the burden of the proof was on the defendants, and that the affirmative was with them. The plaintiffs' counsel objected and claimed that he was entitled to open and close the case.

The referee decided that the plaintiff was entitled to open and close the case, to which decision defendants' counsel excepted. The counsel for plaintiffs, thereupon opened

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the case, produced the promissory notes mentioned in the complaint and rested. The referee having decided in favor of plaintiffs, the defendants appealed to the general term upon the foregoing and other exceptions.

FREDERIC R. COUDERT, *counsel for appellant,*

Argued as follows on the point above suggested.

The referee erred in his ruling to the effect, that the plaintiffs were entitled to open and close.

I. The defendants specifically admitted all the facts in the complaint contained, that were necessary to the recovery of plaintiffs, viz.: "Themaking, indorsement, transfer, delivery and non-payment" of the notes in suit. The subsequent denial was manifestly intended to dispute the lawfulness of the claim and nothing more. If the affirmative defense in the answer was established on the trial, then the plaintiffs were not the lawful owners of the notes in suit, and the defendants were not justly indebted on the notes. If no affirmative defense was proven, then the plaintiffs were entitled to judgment without any proof whatever.

II. It being clear that the affirmative was with the defendants, we submit that the error of the learned referee in denying them their right to open and close, is a subject of review by the appellate court, and that the defendants on this ground alone, are entitled to a new trial. (*Huntington agt. Conkey*, approved in 31 N. Y., 614; 33 Barb., 218; citing *Davis agt. Mason*, 4 Peck, 158; *Brooks agt. Barrett*, 7 Peck, 98; 8 Metcalf, 64; 7 Cush., 563; *Rolum agt. Hanson*, 11 Cush., 44; *Hoxie agt. Green*, 37 How., 97.)

III. Nor is it for the defendant to show that the error of the referee prejudiced him. It is for the plaintiff to prove the negative of that proposition. (*Greene agt. White*, 37 N. Y., 384.)

GEORGE C. GENET, *attorney, and*

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JAMES C. CARTER, *counsel for respondent*,

Argued that the denial of "*all other allegations*" was sufficient to entitle plaintiffs to the affirmative, and moreover, that it was a question within the discretion of the referee, and his ruling thereon would not be reviewed.

After argument, the court declined to look into the other exceptions in the case, and held that the referee erred in not allowing defendants to open and close the case, and reversed the judgment accordingly.

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N. Y. SUPERIOR COURT.

JOSEPH F. MARTIN, plaintiff and respondent, agt. WILLIAM
A. FARNSWORTH, defendant and appellant.

In November, 1862, the defendant's bark, *Antietam*, being ashore near the Delaware Breakwater he sent a telegram to his agents in New York, as follows: "Lewes, Del., Nov. 13, 1862. To Metcalf and Duncan: Send me small tug-boat, steam-pump, engineer, my diving apparatus and diver, or telegraph Eben Eaton, 90 Bolton Street, South Boston, to come. Make the best trade you can. W. A. FARNSWORTH," which was received same day.

Messrs. Metcalf & Duncan chartered the plaintiff's tug-boat, *May Queen*, to go down to the Delaware Breakwater upon that service. The terms of the charter were all agreed upon, except that the plaintiff required a coast pilot to go with him on his tug-boat. Messrs. M. & D. asked plaintiff what a coast pilot would cost; he answered that he did not know, that he would get one as cheap as he could. Afterwards he selected a coast pilot, and introduced him to Messrs. M. & D., who inquired of the plaintiff if he was satisfied with him, to which plaintiff replied that he was perfectly; and Messrs. M. & D. thereupon agreed to pay the amount of the pilot's wages—\$5 per day.

The *May Queen* sailed from New York in the afternoon of Nov. 14, 1862. After having run into and remained in Absecom Harbor (80 miles from New York), on account of stress of weather, they continued the voyage on the afternoon of Nov. 17. When night came on, the weather had thickened and rain had commenced. The (coast) pilot was at the helm. The captain, mate, engineer and men had gone below to supper, leaving the pilot the only person on deck—there being no lookout. The pilot saw, on the starboard bow of his vessel, a single light. He took his glass and examined her. She was under sail, and showed but one light, and did not whistle, and the pilot concluded that she was a sailing vessel, as he had a right to, for vessels under steam should show more than one light, and are bound to whistle when approaching. He accordingly put the helm of the *May Queen* to starboard to turn her away from the approaching vessel. She, however, proved to be the United States steam gun-boat *Wamsutta*; which, seeing the *May Queen* ahead, put her own helm to port. A collision occurred, by which the *May Queen* was lost.

Held by the general term, that the court below should have concluded from the testimony given that plaintiff was mistaken or forgetful of the specific terms of the contract about the pilot, and that in truth and fact, Duncan, acting as the agent of defendant, only agreed to *pay the expense or hire of the pilot* for the voyage, and upon such a conclusion the court should have dismissed the complaint upon motion, and the refusal so to do was error.

But assuming that the court and jury were correct in their conclusion that defendant did contract with the plaintiff "*to furnish a coast pilot for the voyage*," and

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thereby incurred all the liabilities that would ensue from the use of those words, yet as a conclusion of law, such a contract did not make him responsible for the care and management and safe navigation of the vessel on the said voyage, but that the said pilot was received and placed upon said vessel, simply as a *pilot at sea*, to advise and direct the course of the vessel to her place of destination, subject to, and under the general authority and command of her *master*, who was the superior officer of such pilot during the whole voyage, and upon whom (the master) devolved the responsibility of the general care and management of such vessel during her voyage.

The court below erred in its ruling, when it admitted testimony, objected to by defendant, of a usage or custom in regard to *coast pilots* having absolute and supreme control and management of a vessel on a voyage like this, as the superior of the master of said vessel.

Such control and management and the government and discipline of a vessel like this, engaged on such a voyage, should be determined as a question of law, and cannot be considered as a question of fact based upon custom or usage. This power and authority is clearly and unquestionably conferred upon and intrusted to the *master of the vessel* by the common, civil and maritime law, and he (the master) must be held responsible for its non-use, or abuse, and he cannot evade that responsibility, nor shift the same from himself upon other persons by virtue of any custom or usage to the contrary.

Heard at the October General Term, 1870.

Before MONELL and SPENCER, JJ.

Case tried before Judge McCUNN.

APPEAL from a judgment entered upon the verdict of a jury, in favor of plaintiff, for \$7,598 01, in December, 1869.

In November, 1862, the defendant's bark *Antietam* being ashore near the Delaware Breakwater, he sent the following telegram to his agents in New York :

“ *Dated Lewes, Del.,*

“ 13, 1862.

“ *Received New York, Nov. 13, 1862.*

“ *To* METCALF & DUNCAN :

“ Send me small tug-boat, steam-pump, engineer, my diving apparatus and diver, or telegraph Eben Eaton, 90 Bolton St., South Boston, to come. Make the best trade you can.

“ W. A. FARNSWORTH.”

Messrs, Metcalf & Duncan chartered the plaintiff's tug-boat *May Queen*, or *Cinderella*, to go down to the Delaware Breakwater upon that service. In regard to the terms of this contract the evidence was as follows :

On the part of the plaintiff, the plaintiff testified : On the

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13th of November, 1862, Metcalf & Duncan sent for me, and I went to their office (in New York); they said they had received a telegraphic dispatch from Lewes to send down a small tug-boat to the Antietam; I agreed with them to go down to the Antietam. They were to pay for the coal on board at the rate of \$5 50 per ton. I told them they must furnish me a pilot. They said they did not know where there was a pilot at that particular time; they asked me to find one for them. I found Mr. Cutler, and took him in to Metcalf & Duncan the next morning, and they made a bargain with him to navigate the boat for \$5 a day, and he was to make himself generally useful in endeavoring to save the Antietam in the interest of her owners when he got down there. The business of the May Queen was towing in and about the harbor of New York and to and from sea; she had no pilot of her own, and the people on board were not acquainted with the navigation along the coast down to the Delaware; it would not have been safe to have sent her without a coast pilot; I would not have sent her without one. When she went upon this voyage she had her usual crew on board, a *competent master*, a *competent first officer*, a *competent engineer*, and a *competent crew*, and she was well equipped in every respect; I found Mr. Cutler (the pilot) at the Hell Gate pilot office; I went there for him; I had known Mr. Cutler as a coast pilot before I took him up to Duncan & Metcalf, and introduced him, saying, "This is Mr. Cutler, a coast pilot;" I then told them to make their own arrangements, that I had nothing more to do with it; William H. Martin, a son of mine, was master of the boat; he was about twenty-three years of age.

On the part of the defense, Samuel Duncan, of the firm of Metcalf & Duncan, ship agents, &c., testified:

I negotiated a charter of this vessel in question in pursuance of that telegram; that was my authority, and the only authority I had; I received the dispatch late in the afternoon of the 13th and looked around for a boat, and left

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word at Martin's office for him to come down to our office. He came down in the afternoon and said he had this boat, and would charter her for \$6 00 per hour, if we would furnish a pilot and coal; I told him that was rather high, and that we would look around, and he might come in again; finally he came in again, and we told him we could give him \$4 50 an hour, and pay for his pilot and coal. I asked him what a pilot would cost, and he said he did not know, that he would get one as cheap as he possibly could. Afterwards he brought in Captain Cutler and introduced him to me, and said he was a good pilot and would go for \$5 a day. I asked him if he was satisfied with the pilot, and he said he was *perfectly satisfied*. I told him that I knew nothing about the pilots along the coast, and that he might look out for his own pilot. Subsequently the witness was interrogated by plaintiff's counsel in regard to a letter he wrote to the defendant on the 14th of November, 1862, in regard to the matter, of which the following is an extract:

“*New York, Nov. 14, 1862.*

“W. A. FARNSWORTH, Esq., *Lewes Del.*

“DEAR SIR:—We received a dispatch from you late yesterday evening, saying, ‘send me small tow-boat, steam pump, engineer, new diving apparatus and diver, or telegraph Eben Eaton at Boston to come; make best trade you can.’

“Immediately after receiving the dispatch we commenced to look around for a tug-boat and found that the smallest boats would not go outside, and that the best we could do was to charter the steamer May Queen at the rate of \$4 50 per hour, coal to be furnished by us, coal sufficient for the passage down will put on board here at \$5 50 per ton, and whatever the steamer may require afterwards you can probably furnish from there.

“We are also obliged to furnish a pilot at \$5 per day, he agreeing to work and render you all the assistance he can in getting off the bark.”

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Q. Was it true on the 14th of November, when you wrote that letter, you were to furnish a pilot at \$5 a day ?

A. Yes, I suppose it was.

By defendant's counsel :

Q. What do you mean in that letter when you say " we are also obliged to furnish a pilot " ?

A. I meant we would have to pay \$5 a day for a pilot, in addition to the \$4 50 an hour, that is what I meant, and nothing more or less.

Abner Cutler (the pilot in question) testified, on the part of the defendant, in regard to the employment of himself as pilot on this occasion :

Mr. Martin came to the Hell Gate pilot office, and asked if there were any coast pilots ; the gentleman keeping the place pointed me out ; Martin asked if I was a coast pilot. I said, yes ; he said he had a boat going south, and wanted to know what I would charge to go to the Breakwater ; I said \$5 a day. He said that would do, that that was the sum to which he was limited to pay ; he invited me to go into Duncan's office, *as they paid the price of the coast pilot*. He introduced me as the man he had selected to go and pilot the boat down. Mr. Duncan asked me if I was a coast pilot, a competent pilot, or acquainted down there ; I told him I was. He asked me what wages I charged ; I told him \$5. Mr. Martin said, " I believe that is what we agreed upon." Mr. Duncan asked Mr. Martin if he was satisfied with me, and he said he was. We started, I think, the 14th November, on a Friday, in the afternoon.

George Gregory, a witness on the part of the plaintiff, testified as follows :

I know Farnsworth, and have seen Mr. Martin, the plaintiff. I was present at Mr. Duncan's office at the time of a negotiation for the steam-tug May Queen, in November, 1862. I heard Mr. Martin and Mr. Duncan trying to make a bargain for the charter of the steamboat ; I forget the boat's name ; Mr. Martin asked six dollars an hour for his

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boat; they did not agree on that; Mr. Duncan offered him four dollars and a half an hour for the boat, which Mr. Martin accepted; then Mr. Martin wanted Mr. Duncan to furnish him with a coast pilot, which Mr. Duncan refused to do; Mr. Duncan proposed to pay the hire of the pilot and let Mr. Martin furnish his own pilot; Mr. Martin went out, and was gone I suppose half an hour, and came back with a man and introduced him as Captain Cutler; Mr. Duncan asked one of them if he was a good pilot on the coast; Mr. Martin said he was satisfied with him.

The following statement of facts in regard to the voyage and the loss of the said steam-tug appeared from the evidence on the trial, and is collated from the testimony of all the witnesses:

The vessel sailed from New York harbor in the afternoon or evening of Friday, the 14th of November, 1862, bound for Delaware Breakwater, distant about one hundred and twenty miles. She was manned by a captain or master, first officer or mate, engineer, fireman, pilot, and three other mariners. The pilot was the same one heretofore referred to as the coast pilot engaged for the voyage. He had been acting as coast pilot for four years, and had been a sailor since his youth, a period of about thirty-four years, during which time he had been mate of a brig and a ship and master of a brig, and knew the courses and route of the proposed voyage, and the coast along which the vessel would pass. That night or early next morning, there was a fresh breeze blowing that raised considerable sea, and the master thought the weather too rough to run the vessel, or that she was not sufficiently strong to run in such weather, and that it would endanger her to stay out, and he ordered the pilot to make a harbor. The pilot thought the boat should stay out, and go on her voyage, and that she could stay out with safety; that there was no danger from the wind or sea, and she could go on to the Breakwater, then distant about fifty miles, which with the speed she was then making she would

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reach in eight or nine hours ; but agreeably to the master's order or request, the pilot went into Absecom harbor, eighty miles from New York, and reached anchorage therein at half-past ten o'clock, Saturday forenoon, November 15, 1862, where they remained until about two o'clock Monday afternoon, November 17, when they continued the voyage. When night came they were in sight of Cape May light, west-south-west from the vessel. The weather had thickened and rain had commenced. The pilot was at the helm, The captain, mate, and engineer had gone below to supper, leaving the pilot, the only person on deck, there being no lookout. The pilot saw on the starboard bow of his vessel a single light. He took his glass and examined her. She was under sail and showed but one light and did not whistle, and the pilot concluded that she was a sailing vessel, as he had the right to, for vessels under steam should show more than one light, and are bound to whistle when approaching. He accordingly put the helm of the May Queen to starboard to turn her away from the approaching vessel. She, however, proved to be the United States steam gunboat Wamsutta, which, seeing the May Queen ahead, put her own helm to port. A collision occurred between the two vessels, by which the May Queen was lost.

The captain and mate of the Wamsutta, testified that the lights of the tug were seen by them at the distance of an eighth of a mile, and supposing the tug was heading towards them they kept off to the eastward, and the tug seemed to do so likewise. There was no sounding of the steam-whistle by the Wamsutta.

The collision seems to have occurred from the mistake of the pilot of the steam-tug, mistaking the Wamsutta for a sailing vessel coming in an opposite direction ; and being off his starboard bow, he kept the tug to the eastward to avoid crossing the bow of the supposed sailing vessel. The people on the Wamsutta, knowing the tug to be a steamer, kept off to the eastward, but sounding no whistle.

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The court (after objection by defendant) allowed plaintiff to prove by witnesses a custom or usage in respect to the relation between a coast pilot and the master of a vessel on board of a vessel at sea, their respective authority in command over each other, and upon which rested the absolute charge and control of the vessel. To this ruling defendant excepted, the witnesses introduced by the plaintiff testifying substantially that a coast pilot took absolute charge and had absolute control of a vessel, her watch and crew, and the discipline of the same, her lights, and her officers including the master, and that the latter was subordinate to the pilot, who was supreme in command, and that the latter was not bound to obey any order or command of the master. This testimony was contested by other witnesses. The testimony of the latter tended to establish that the only duties of a coast pilot on board a vessel was to direct as to the course of navigation of the vessel along the coast, and to take the vessel in and out of ports and harbors as directed by the master, who was supreme in command and had absolute charge and control of the vessel and crew, including the pilot and upon whom (the master) devolved all the responsibility of the care and government of the vessel, and the control and discipline of his officers and mariners, on board of the same.

There was testimony uncontradicted in regard to the incompetency and inexperience of Martin, the master of the tug, as a master of a vessel at sea, and also that there was no regular watch kept on board or on deck, and that there was no lookout on deck at the time of the accident or for some time previous.

At the close of the testimony in the case, the defendant moved to dismiss the complaint on the following grounds:

First. The pilot was plaintiff's agent. There is no law requiring plaintiff to take a pilot on board. He selected the pilot. The pilot was doing his work. Metcalf & Duncan had no power to employ and put a pilot on board the

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ship, or in any manner to bind the defendant for the safe navigation of the ship.

Second. The negligence of the master and crew contributed to the injury. Neither the captain nor mate had been on watch within twenty-five minutes previous to the accident.

There is no proof that there was a proper lookout posted, and that he was attending to his duty at the time of and just previous to the collision, and the person who should have been on the lookout was in court, and was not called by the plaintiff. There is no evidence that the collision was the result of the negligence of the pilot. That the evidence shows that the plaintiff found the pilot, brought him to Metcalf & Duncan, and expressed his satisfaction as to his competency as a pilot, and therefore he was not the agent of the defendant. Also, that the evidence shows that Cutler, the pilot, was employed by both parties to do an act in which they were mutually interested. He was, therefore, the agent of both parties, and being the agent of both parties, neither can recover against the other for any act of his or any negligence.

This motion was denied and defendant excepted.

The plaintiff claimed to recover, in this action, the value of the lost steam-tug from the defendant, assuming that, under the contract, the defendant became liable for the safe navigation and management of the tug under said pilot, and that the same was lost through the carelessness, unskilfulness and negligence of said pilot upon said voyage.

Defendant denies his liability, and claiming the loss to have occurred through the fault of the plaintiff and his agents and servants, demands judgment for the value of the property on board belonging to defendant, which was also lost.

The jury found a verdict for the sum of \$5,602 50 in favor of plaintiff, upon which judgment was entered, and from which judgment the defendant appeals.

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BENEDICT, BURR & BENEDICT, *for appellants.*MARTIN & SMITH, *for respondents.*

SPENCER, J.—There was much testimony of a conflicting character before the court and jury on the trial of this action; but in the view I take of the case, and the principles upon which it should have been decided, much of this testimony was irrelevant, and immaterial to the issues. With due respect for the learned judge and counsel before and by whom this case was tried, I think that the principles and precedents that should govern maritime contracts, like a charter of a vessel, or the relations existing between and which control the action, service and liability of a master and mariners upon a vessel at sea, were overlooked.

The questions considered by the court below appear to have been as follows:

First. Did the telegram authorize Messrs. Metcalf & Duncan to charter this tug for the service, and to contract to furnish a pilot for her navigation on the proposed voyage?

Second. And if the authority was sufficient, and the agreement was to furnish a pilot (instead of paying for the service of a pilot, as contended by defendant), did the contract have the effect of placing the tug in the possession and under the control and management of the defendant to that degree, that he became liable for the care and management and the safe navigation of the vessel in her contemplated voyage, and for any negligence, lack of skill, or diligence on the part of the pilot so furnished, or on the part of the master and crew of the vessel during said voyage?

Third. Was the vessel lost by or through the want of skill or the negligence of the pilot in the performance of his duties as such, or of the master and crew, while acting under his management and control during the voyage?

Fourth. These questions being decided in the affirmative, what was the amount of plaintiff's damages in the premises?

I think the telegram was sufficient to authorize Metcalf

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& Duncan to do in the premises all that plaintiff claims they did do, and that their action bound the defendant. I think the words "send me small tug-boat" were most full and comprehensive, as authority to provide the same in any manner and upon the best terms possible, and their contracts in the premises (whatever the same were) for tug-boat, steam-pump, engineer and diver for this service were binding upon their principal.

I think the weight of evidence, however preponderates in favor of the version of the contract as claimed by the defendant. The plaintiff is the only witness whose testimony tends to establish that the contract was *to furnish a pilot*, and his great interest in the result of the action raises a presumption against the absolute accuracy of his memory in regard to the specific words that were said or were used by Metcalf & Duncan in making the contract, especially when contradicted by the positive testimony of Mr. Duncan, who made the contract, and the witness George Gregory, who was present at the time the contract was made; and the testimony of these two is supported by that of the pilot, Cutler, in regard to what took place and was said when he (Cutler) was introduced to Duncan.

I think the court should have concluded from this testimony that plaintiff was mistaken or forgetful of the specific terms of the contract about the pilot, and that in truth and fact Duncan, acting as the agent of defendant, only agreed *to pay the expense or hire of the pilot* for the voyage, and upon such a conclusion the court should have dismissed the complaint upon motion, and the refusal so to do, was error. I think, also, that upon the charge and submission of the case to the jury, the jury should have found a verdict for the defendant. In finding for the plaintiff the jury not only disregarded the charge of the court, but also found a verdict wholly unsupported by the evidence that was material in the case, and therefore, the judgment should be reversed. But assuming that the court and jury were correct in their conclusion that

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defendant did contract with the plaintiff "*to furnish a coast pilot for the voyage,*" and thereby incurred all the liabilities that would ensue from the use of those words, yet I hold as a conclusion of law that such a contract did not make him responsible for the care and management and safe navigation of the vessel on the said voyage, but that the said pilot was received and placed upon said vessel, simply as a pilot at sea, to advise and direct the course of the vessel to her place of destination, subject to and under the general authority, and command of her master, who was the superior officer of such pilot during the whole voyage, and upon whom (the master) devolved the responsibility of the general care and management of such vessel during her voyage. I hold that this pilot was only a mariner or a subordinate officer, whose duty was to advise and direct the master in regard to the course the vessel should take, or in other words *the navigation of the vessel* from New York to the Delaware Breakwater. He was an assistant for that purpose, supposed to know the coast near to which their course of navigation lay, and to know the ports and harbors into which the vessel could be taken in case of storm or peril of any kind, and to know and be able to advise and direct the best courses upon which to sail in order to accomplish the voyage in the most safe and expeditious manner. Yet he (the pilot) could give no order or direction that could be enforced, except such as was approved and executed by and through the superior and supreme authority of the master. The extreme limit of the responsibility of the defendant under this contract was, that he should furnish a man that was a good coast pilot, one who possessed knowledge and experience in regard to the coast, the locality of the point to be reached, and the approaches thereto, to that degree that he was competent to advise the master, and, under his authority, direct the course or navigation of such vessel upon such voyage *along the coast*, and thus enable the master to safely navigate his

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vessel and make a voyage *along*, and to a point upon, a coast with which he and his other officers and mariners were unacquainted ?

There are generally headlands, islands, shoals, currents, inlets, beacons, or harbors (as in this case,) to be sought or avoided, in such a voyage, and which are among the incidents of coast navigation, and a full knowledge of these the coast pilot is presumed to possess. He is a pathfinder for the vessel upon such a voyage. He points out and directs the best route and course to accomplish the voyage expeditiously and safely *along the coast* to the destined port.

There is no question in this case as to the competency of Cutler in these respects. In fact, the evidence fully establishes that he was a coast pilot of experience and ability, and I think the defendant *furnished a coast pilot* fully competent in all respects, when he furnished Cutler as one.

There is no evidence of any lack of skill, nor negligence in the performance of his duties as a *coast pilot* on the part of Cutler, as I view this case. If there was negligence, lack of skill or judgment on his part, of any kind, it was in the performance of other duties than those of *coast pilot*, namely, in those of steersman, lookout, or mariner, which he was at the time (by the consent and direction of the master) performing on said boat.

I also hold that the court below erred in its ruling when it admitted testimony, objected to by defendant, of a usage or custom in regard to coast pilots having absolute and supreme control and management of a vessel on a voyage like this as the superior of the master of said vessel.

Such control and management and the government and discipline of a vessel like this engaged on such a voyage, should be determined as a question of law, and cannot be considered as a question of fact based upon custom or usage. This power and authority is clearly and unques-

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tionably conferred upon and intrusted to the master of the vessel by the common, civil, and maritime law, and he (the master) must be held responsible for its use, non-use, or abuse, and he cannot evade that responsibility nor shift the same from himself upon other persons by virtue of any custom or usage to the contrary.

Abbott on Shipping, at page 231, defines this law: "By the common law the master has authority over all the mariners on board the ship in all lawful matters relating to the navigation of the ship. Such authority is absolutely necessary for the safety of the ship and the lives of all persons on board."

The late Judge BETTS, who was distinguished for his learning and ability as a judge of maritime law, has expressed himself in many cases to the same effect. In one he uses these words: "The master of a vessel has complete authority in everything relating to the management and conduct of his vessel."

See also opinion of Judge WARE, (*Butler agt. McLellan, et al., Ware's Rep.*, 222): "The captain has all the authority of command on board the vessel, and the inferior officers, as well as the common seamen, are bound to obey his orders."

The admiralty decisions favor only a single division of persons in charge of a ship, viz., that of "master and mariners" or "master and crew." "In cases of a lien upon a ship for wages under admiralty law, the pilot as also all other officers under the rank of master are deemed and classed as mariners, and hold their lien as such, which is prohibited to the master. He has no lien because he is the master, the agent and representative of the owners, in the performance of all his duties as master. In salvage and prize cases, the pilot has been classed and considered as a mariner. In one of the oldest treaties upon maritime law, a copy of which is to be found in the appendix to 2d vol., *Peter's Admiralty Decisions*, the power and responsibility of a master of a vessel are thus defined:

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A master of a ship is one who for his knowledge in navigation and for his fidelity and discretion hath the government of the ship committed to his care and management."

"The law looks upon him as the officer who must render and give an account *for the whole charge*, when once committed to his care and custody, and if misfortunes happen through negligence, wilfulness, or ignorance, of himself or his mariners, *he must be responsible.*"

"The master hath the supreme rule on shipboard."

The duties of mariners are comprised in the words "Obedience to the lawful commands of the master."

"The mariners are under his correction and government, *and know no other superior on shipboard but himself.*"

The "*Laws of Oberon*," the "*Laws of Wisbuy*," the "*Laws of the Hanse Towns*," the "*Marine Ordinances of France, or of Louis XIV.*," comprise the earliest sea laws codified, and are the basis of the present maritime law of this country, as also of all other nations.

They recognize the office of pilot on board of a vessel for the voyage, and distinguish between his duties and those of a harbor or river pilot.

"The local pilots were called 'locmen,' and were mariners hired at every river or harbor to assist the pilot of the vessel in guiding the course of the vessel into harbor, or through a river or channel, so as to avoid shoals, rocks, &c., &c. If a vessel was lost by the false direction or ignorance of the local pilot, he was liable to lose his head at the hands of the master, or any of the mariners, who were authorized to cut it off, as a penalty for his false pretences of knowledge or skill" (*Laws of Oberon, Arts. 13 & 14, and note of Cleirac to Arts. 1 & 14*).

"The master shall *chuse* the ship's company *and hire the pilots, mates and mariners.*"

"We enjoin all masters making long voyages, to assemble every day at noon, or oftener if necessary, the mates and pilots and other expert persons, and to *confer with them*

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about the courses made and *to be made*" (*Ordinances of France*).

"The master must understand the art of piloting and navigation, that he may know how to *control the pilot, and mind* how he steers the ship."

"In a merchantman the first officer is the master, the second the pilot (who enjoyed that place because in honor of the sciences he *profest and practysed*), the third the mate," &c. (*Note to Art. 1, Laws of Oberon*).

By the *Laws of Wisbuy*, the master was obliged to hire a local pilot of a harbor, or river, or channel, when requested so to do by *his own pilot* and his mariners.

The first article of these last-named laws classifies the mate and pilot as mariners.

The second article provides that every pilot who does not understand his business shall repay the master the wages advanced to him, and half as much more as he had promised him.

The fifty-ninth article provides, that when a ship is in or before a harbor or river with which her pilot (the ship's pilot) is not well acquainted, the master ought to hire one at the place to carry his ship in.

The distinction between a harbor, river, or channel pilot and a pilot on board ship during the whole voyage is recognized and defined in *Abbott on Shipping*, p. 266, § 195, and several decisions are there quoted in the notes, to the effect that the latter kind are properly mariners. I do not consider nor discuss this case as one affected by or connected with the rules that govern the management of a vessel when under the direction or subject to the duties of a licensed harbor or river pilot, on pilot grounds. This is not such a case. It is that of a pilot for a voyage, and governed by the general rules of law applicable to the relations of master and pilot at sea or on a voyage, which, I hold, cannot be determined by usage or custom.

The master of the tug, in this instance, did not provide a

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proper watch, nor a lookout, on board of his vessel. He placed the pilot in charge of the wheel, and he and the mate descended to the kitchen for their supper. He left no one upon the deck except the pilot, and he at the wheel. The pilot, acting as wheelsman, without captain, mate, watch, or lookout, or any one within his call to aid him, or advise with him in any emergency, was left exclusively to his own observation and judgment and action, in relation to any approaching vessel. He saw one that he concluded was a sailing vessel, headed towards the northwest, or to his starboard. He kept on his course instead of steering to the starboard, or crossing the bow of what he deemed a sailing vessel. This was right, according to his sight and judgment, in relation to the approaching vessel at the time. His observation, judgment, and action were in fault, for the supposed sailing vessel proved to be a steamer, and he discovered his mistake too late to avoid the direful results of a collision. I hold that in such a case, neither he nor his employers should be held liable for this error of judgment, which depended upon his observation, and was not the result of carelessness, nor want of skill as a *coast pilot*.

First. As wheelsman, or helmsman, in full and sole charge of the deck, he exercised his best judgment and skill and the greatest care and diligence, and was not guilty of any negligence of his duty as such, and he is not liable for the mistake in his observations.

Second. As wheelsman or helmsman he was the servant and agent of the plaintiff, and not of the defendant. He was not performing the duties of a coast pilot at the time.

Third. As *coast pilot* he was under and subject to the commands of the master of the tug, and was substantially the servant and agent of the plaintiff, and neither he nor his employer was liable to the plaintiff for any accident or damages, except those which could be directly traced to his ignorance of the coast, or lack of knowledge and skill as a coast pilot, and neither he nor his employers were liable

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or responsible for the proper management of the vessel, for proper helmsman, lights, lookouts, watch, its speed, or any other matter pertaining to its government and discipline on the voyage.

The master was responsible for all these things, and if, through any fault and negligence of his in the premises, loss occurred, the plaintiff must bear the same.

Such a claim as this on the part of plaintiff cannot be sustained.

I hold that the master and his officers and mariners, including this coast pilot, were the agents and servants of the plaintiff. The master was the superior officer over the pilot; he was supreme in command upon that vessel. He was under no other obligation to heed the advice or direction of the pilot, nor to enforce the same, beyond the obligation that arose from his conviction of mind and judgment that the advice was good, and that the direction was entitled to consideration and enforcement.

And it seems the parties understood their respective relations and acted thereupon, for the evidence tells us that the master consulted with the pilot about entering a harbor on the way down, and ascertained that Absecom harbor could be most conveniently reached. The pilot thought and advised that it was unnecessary to make a harbor; that it was proper and safe for the vessel to continue on its direct course at sea towards the Delaware Breakwater.

The master differed in opinion and judgment with the pilot, and commanded him to make Absecom harbor, and the pilot very properly obeyed the command or request of his superior officer.

The *coast pilot* was overruled by the master, and submitted. The master was responsible for this deviation from their course and delay in their voyage; and if, upon the resumption of the voyage, there was a lack of proper lights, lookouts, watches, or any other matters necessary for the proper and careful management and sailing of the vessel on

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her voyage, or an absence of necessary precautions against peril at sea, the exercise of which might have avoided this calamity, he is equally responsible, and he and his employers should not be relieved therefrom, and the consequences of a collision fall upon a coast pilot on board, who was his inferior officer, and engaged at the time in the performance of other duties than those of coast pilot, to which he had had been assigned, or permitted to perform, by the master.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

Judge MONELL, in his opinion, concurs in the conclusion without discussing the relations of master and pilot.

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SUPREME COURT.

THE CITY OF ROCHESTER, respondent, agt. AMON BRONSON
and others, appellants.

A *receiver* when appointed of the property of a *corporation*, displaces the directors or other body that by its charter are authorized to manage its affairs, and under the direction of the court by whom he is appointed, has the sole control of its property and effects; and when authorized so to do, the exclusive power to use its franchises.

Such an appointment ought not to be made, unless in a case of necessity to protect the stockholders or creditors from loss, or to prevent an abuse of the corporate franchises.

The stockholders are entitled to have the selection of the agents who are to manage the affairs of the corporation, and this power ought not to be taken from them unless it is necessary for their own protection, or that of creditors, or the state.

The act of 1870, (*ch.*, 151,) assumes to enumerate the cases in which receivers of corporations may be appointed, and to prescribe the length of notice which must be given of the application for such appointment; and in the most emphatic terms forbids the appointment, unless in the cases expressly enumerated by it.

A construction which would tolerate a receivership at the discretion of the court, because it is proposed to extend it to but a *part of the corporate property*, would annul the statute, and increase instead of lessen the abuses which the act of 1870, was intended to remedy or prevent.

The plaintiff owns a majority of the stock of the Rochester and Genesee Valley Railroad, and under the act of 1851, was entitled to appoint four of the 13 directors of that corporation. In 1867, the act of 1851, was amended so as to empower the plaintiff to choose seven instead of four of the said directors. A part of the stockholders insisting that the act of 1867, was in violation of the constitution, treated it as of no force and proceeded to elect directors under the act of 1857. The other stockholders elected a board of directors under the act of 1867; and the plaintiff proceeded under the latter act to appoint seven of the 13 directors.

Both boards claiming to act, each as the legally constituted board, suits were instituted to determine the right of the board elected under the act of 1851, to act for the company. And it was held by the general term in the 7th district, that the act of 1867 was constitutional and valid, and that the persons elected pursuant to its provisions constituted the board of directors of said railroad company. Since the commencement of this action, the judgment of the general term has been affirmed by the court of appeals *pro forma*, that an appeal may be taken to the supreme court of the United States.

In 1858, the Rochester and Genesee Valley R. R. Co., leased its road to the Buffalo N. Y. and Erie R. R. Co., for ten years with the privilege to the lessees to extend

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the term ten years longer—the rent for the use of the road was 48 per cent. of the gross earnings of the company, payable on or before the 25th day of each month succeeding the month in which the earnings accrued. The lessee, in 1863, assigned this lease to the Erie R. R. Co., who assumed to fulfill the conditions of the lease on the part of the lessee.

This action is brought to recover a balance of *rent* claimed to be due to the plaintiff under the aforesaid lease, and for the appointment of a receiver of the property and effects of the Rochester and Genesee Valley Railroad Company, alleging the insolvency of the Erie Railroad Company, the present lessee of said former road, &c.:

Held, that the insolvency of the Erie Company, to say the least, is as positively denied by the president of the company as it is affirmed in the complaint, and so far, therefore, as insolvency formed a ground for the receiver's appointment it was removed:

Held also, that so far as the resistance of the Erie Company to the action brought to recover the rent is concerned, or the resistance by the directors who have been held not to be duly elected by the decisions of the courts against them, they furnish no ground for the appointment of a receiver. It is the right of every party to a litigation to appeal from adjudications against him.

Defenses are embarrassing to a plaintiff who is endeavoring to enforce an honest claim, but the right to put them in must be defended notwithstanding they may be put in occasionally, in bad faith. There are other and less mischievous remedies for such abuses than the appointment of receivers.

Fourth Judicial Department, General Term, March, 1871.

Before MULLIN, P. J.; JOHNSON and TALCOTT, JJ.

APPEAL by defendants from an order appointing a receiver, &c.

By the court, MULLIN, P. J.—The plaintiff is the owner of a majority of the stock of the Rochester and Genesee Valley Railroad Company, and by an act of the legislature passed in 1851, was entitled to appoint four of the thirteen directors, authorized by the charter of the company to manage the affairs of the corporation.

In 1867, the last mentioned act was amended so as to empower the plaintiff to choose seven instead of four of the directors.

A part of the stockholders insisting that the act of 1867, was in violation of the constitution, treated it as of no force and proceeded to elect directors under the act of 1851, and the stockholders, who deemed the act of 1867 as valid, elected a board pursuant to that act, the city designating

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seven of the thirteen directors. Two boards of directors were thus brought into being, each claiming to be the legally elected board of directors, and as such authorized to manage and control its affairs.

Suits were instituted to determine the right of the board elected under act of 1851, to act for the company, and it was held by the general term in this district, that the act of 1867, was constitutional, and that the persons elected pursuant to its provisions constituted the board of directors of said railroad company. The judgment of the general term has, since the commencement of this action, been affirmed by the court of appeals *pro forma*, that an appeal may be taken to the supreme court of the United States.

In 1858 the Rochester and Genesee Valley Railroad Company leased its road property and franchises to the Buffalo, New York and Erie Railroad Company for ten years, with the privilege to the lessee to extend the time ten years longer. The rent to be paid for the use of the road was 48 per cent. of the gross earnings of the company, payable on or before the 25th day of each month succeeding the month in which the earnings accrued, and to that end the lessee was to furnish a just and true statement of such earnings.

The Buffalo, New York and Erie Company in 1863, assigned this lease to the Erie Railroad Company, who assumed to fulfill the conditions of the lease on the part of the lessee.

The Erie company paid the rent in accordance with the conditions of the lease, as claimed by the plaintiff, down to January or February, 1869, but, as claimed by the Erie company, down to December, 1869; and it is claimed by the latter that by reason of the neglect of its auditor to keep up the accounts of the company, a formal statement of the gross earnings of the company could not be furnished, yet the amount of such monthly earnings had been estimated, and the amount of such estimated earnings specified in the

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lease to be paid to the lessor, has been paid down to and including April, 1870.

The plaintiff in addition to the facts above stated, alleges that the Erie company is insolvent, and that unless prompt measures be taken to collect the rent, it will be lost, to the loss and injury of the stockholders of said Rochester and Genessee Valley Railroad Company.

It is further alleged, that the Erie Railroad Company owns some 1,500 shares of the capital stock of said Rochester and Genessee Valley Railroad Company, and that the directors elected under the act of 1851, named as defendants in this action, were elected by the votes of the Erie company as owners of said 1,500 shares, and that said directors are conniving with the Erie company to prevent the collection of said rent.

It is further alleged, that the Rochester and Genessee Valley Railroad Company is owing for taxes assessed on the property of said company and has no means of payment but the rent aforesaid, and unless such taxes are paid the property of the company will be sold, to the great loss and injury of the stockholders.

It is further alleged, that the directors, whose title to the office has been established by the adjudications of the courts, have caused an action to be commenced against the Erie company to enforce the payment of said rent, but the company defends the action, claiming that the directors bringing such actions are not the legally elected directors of said company, and they do not know to which of the two boards to pay.

It is further alleged, that with the view to delay and embarrass the duly elected board in its efforts to compel payment of said rent, an appeal to the supreme court of the United States is threatened. And that while the litigation is going on, the rent will be lost, unless a receiver of the property of the corporation is appointed, who can proceed

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and collect the rent, relieved from the embarrassments thrown in the way of the directors.

The Erie Company, through its president, denies its insolvency, and alleges its ability and willingness to pay, as soon as its accounts are so arranged as to enable it to know the amount which ought to be paid.

It is shown by the receipts of the collectors of taxes, that the taxes assessed against the Rochester and Genesee Valley Railroad Company, for state and county purposes in 1869, have been paid, and that the city taxes and the taxes in the village of Avon for 1869 and 1870, have been paid since the commencement of this action.

There are other facts stated in the papers, but I believe the foregoing are all that are necessary to be stated in order to present the question whether the plaintiff is entitled to have a receiver of the property of the corporation appointed.

A receiver when appointed of the property of a corporation, displaces the directors or other body, that by its charter, are authorized to manage its affairs, and under the direction of the court by whom he is appointed, has the sole control of its property and effects, and when authorized so to do, the executive power to use its franchises.

The appointment of such a person, ought not to be made unless in a case of necessity, to protect the stockholders or creditors from loss, or to prevent an abuse of the corporate franchises.

The stockholders are entitled to have the selection of the agents who are to manage the affairs of the corporation, and this power ought not be taken from them, unless it is necessary for their own protection, or that of creditors or the state.

The act of 1870, chap. 151, assumes to enumerate the cases in which receivers of corporations may be appointed, and to prescribe the length of notice which must be given of the application for such appointment.

The 3d section provides that a receiver may be ap-

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pointed of the property of a corporation only by the supreme court in a civil action upon at least eight days notice to the proper officers of the corporation in one of five cases.

The 4th is the only one under which such an application could be made in this case.

It is as follows: In a civil action brought by the attorney general, or by the stockholders, to preserve the assets of a corporation having no officers empowered to hold the same.

The 5th includes the cases in which receivers may be appointed of the property of corporations under the provisions of title 4, chap. 8, part 3, of the Revised Statutes. This case cannot be brought within any of its provisions.

The Rochester and Genesee Valley Railroad Company has officers empowered to hold and preserve the assets of the corporation, and hence a receiver cannot be appointed under this statute.

The appointment is, in the most emphatic terms, forbidden, unless in the cases expressly enumerated.

It is no answer to this position to say, that the receivership cannot be extended in this case to the whole property of the corporation, that it is and must be confined to the rents.

A construction which would tolerate a receivership at the discretion of the court, because it is proposed to extend it to but a part of the corporate property, would annul the statute, and increase, instead of lessen, the abuses which the act of 1870 was intended to remedy or prevent.

If I am right in my construction of the statute, the order appealed from must be reversed.

But, if I am wrong in my construction, I am, nevertheless, of the opinion that the receiver was improvidently appointed.

The insolvency of the Erie company is, to say the least, as positively denied by the president of the company, as it

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is affirmed in the complaint, and so far, therefore, as insolvency formed a ground for the receiver's appointment it was removed.

So far as the resistance by the Erie company to the actions brought to recover the rent is concerned, or the resistance by the directors, who have been held not to be duly elected by the decisions of the courts against them, they furnish no ground for the appointment of a receiver. It is the right of every party to a litigation to appeal from adjudications against him, and if such appeals would justify the appointment of a receiver of their property, but few of the railroad corporations in the state would long be permitted to manage their own affairs.

Defenses are embarrassing to a plaintiff who is endeavoring to enforce an honest claim, but the right to put them in must be defended notwithstanding they may be put in occasionally in bad faith. There are other and less mischievous remedies for such abuses, than the appointment of receivers.

If the directors appointed under the act of 1851, had been held to be the legally elected board, and it had been charged that they were colluding with the Erie Company by whose votes they were elected to prevent the collection of the rent, a strong equitable ground for their removal would be furnished. But in this case, we must treat them as intruders, who have no color of right to interfere in the affairs of the corporation, to permit the acts or misconduct of such men, to furnish a ground for depriving the corporation of the control of its affairs, would be a monstrous imposition.

It is the strange feature in this case, that the legally elected board of trustees is in the attitude of asking that the control of the affairs of the corporation be taken out of their hands, and put into those of a receiver, because they cannot prevent a debtor of the corporation from defending actions brought to collect debts, or because other persons

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claiming to be directors are colluding with the debtor to prevent the collection of the debt.

The legally elected board must proceed in the ordinary way to obtain possession of the property belonging to the corporation. If the laws now in force are not sufficiently stringent to enable them to accomplish the purpose, the legislature will, doubtless, provide others that will be adequate to the attainment of the end. But while the statute of 1870 is in force, the end sought to be attained in this case cannot be attained through the appointment of a receiver.

It is, perhaps, proper that I should say that it is not my intention to express any opinion as to the validity of the election of either board of directors; with that question I have nothing to do, further than to recognize and give effect to the decision of the courts, that have declared the election of one of these boards valid. It is the duty of the court to enforce that decision so long as it remains unreversed,

The order appointing a receiver is reversed, with \$10 costs.

Crouse agt. Walrath.

HERKIMER COUNTY COURT.

ELIZABETH CROUSE, respondent agt. JACOB WALRATH,
appellant.

Justices' courts have had jurisdiction of a class of cases known as trespass or trover, for a limited amount since the organization of the government, and the mere form of an action does not affect their jurisdiction.

The legislature as the law-making power, have the right to increase the jurisdiction of justices' courts, if they do not violate the provisions of the constitution.

Subdivision ten of section fifty-three of the Code of Procedure is not obnoxious to the provisions of the constitution, nor in conflict with the second section of article one of the constitution, with reference to trial by jury. (*This is adverse to the case of Baxter agt. Putney, 37 How., 140.*)

THIS is an appeal from a judgment rendered by a justice of the peace.

The action is replevin, or for the delivery of personal property.

The parties appeared before the justice, and after issue was joined the defendant demanded that the cause be tried by a jury, to be composed of twelve persons.

The justice not having the power to empanel such a jury, overruled the motion, and the cause was tried before the justice and judgment given for the plaintiff, the only question in the case is as to whether or not the justice had jurisdiction of the cause, and could proceed after the request had been made for a jury of twelve men.

MORRIS FIKES, *for appellant.*

I. The justice should have dismissed the cause when the defendant demanded a trial by a jury of twelve men, for he was then ousted of his jurisdiction, for juries in justices'

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courts, cannot consist of more than six men. (3 R. S., 5th ed., 441.)

II. The act of 1860, conferring jurisdiction on justices' courts in actions for claim and delivery of personal property is unconstitutional and void.

a. Prior to the adoption of the constitution in 1846, justices' courts had no jurisdiction of this class of cases.

b. Article one of section two, provides "the trial by jury in all cases, in which it has been heretofore used, shall remain inviolate forever."

c. The word jury, as used in the constitution, means a common law jury of twelve men. (13 N. Y., 427-458; 18 Barb., 451.)

III. The general term decision of *Daxter* agt. *Loomis*, MULLIN, J. (not reported), and of *Baxter* agt. *Putney* (37 How., 140), are authorities in point in this case, and the *stare decisis* rule should be followed and the judgment reversed.

GEO. W. SMITH, *for respondent*.

I. The justice acquired jurisdiction by virtue of subdivision ten of section fifty-three of the Code.

II. The provisions of that section are not in violation of article one of section two of the constitution.

III. A statute increasing the civil jurisdiction of justices' courts, is not obnoxious to the provisions of the constitution by reason of the circumstances that it transfers a class of cases from courts of record, where juries are composed of twelve men, to justices' courts where they consist of six. (*Dawson* agt. *Horan*, 51 Barb., 459.)

IV. The provisions of the constitution securing the trial by jury, "in all cases in which it has heretofore been used," does not prevent the legislature from authorizing trials to be had otherwise than by a common law jury of twelve men in civil courts of local jurisdiction. (*People ex rel. Metropolitan Board of Health* agt. *Lane*, 6 Abb., 106.)

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AMOS H. PRESCOTT, *Co. J.*—The only question that arises in this case is as to the intent and meaning of the 2d section of the 1st article of the constitution of 1846, which is in these words: "The trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever." This provision was inserted in the first constitution adopted in this state after the organization of the government and the same provision has been continued and existed from that time down. The constitution of 1846 continued the office of justice of the peace; and the courts held by such officers were continued, and their power and jurisdiction as inferior courts has been left, since that time, the same as it was before, to be fixed by the legislative power; and the legislature has from time to time increased the jurisdiction of that class of officers, and no question has been raised in regard to the existence of such authority in the legislature, or if it has been raised it is clearly settled by judicial authority that the power exists. If there is nothing in the constitution which prohibits the legislature from enlarging the jurisdiction of justices' courts so far as the trial, or character of the jury is concerned, I cannot see how the provisions of the constitution first referred to are violated. Justices' courts heretofore had jurisdiction only to the extent of twenty-five dollars, now in the same class of cases they have jurisdiction to the amount of two hundred dollars, and it has been held that this is within the constitution and is not obnoxious to the constitutional provision referred to, by reason of the circumstance that it transfers a class of cases from courts of record, where juries are composed of twelve men, to justices' courts, in which they consist of six. Why does not the second section of article first of the constitution apply to such cases as well as to the one in question? Justices' courts have had jurisdiction all the time since the constitution of 1846, and also had before, to try actions for a limited amount in actions heretofore known as trespass or trover where the title of personal property was in question,

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and disputed. Forms of actions are now abolished, and that authority is derived from our present constitution, the legislature has seen fit instead of compelling the party in justices' courts, to take the value of the property as damages, to allow such party to claim the thing itself, the questions to be tried and decided are no more difficult to be determined in the one case than the other, because the same questions are necessarily involved. A party cannot bring an action of replevin in a court of record and recover costs, unless the value of the property, or the damages amount to the sum of fifty dollars. In cases where the party is not responsible, or where the nature of the property is important, it very often was the case before the passage of the recent act, that a party was substantially without remedy, and it seems to me that the statute in question is a very necessary one, and the law should be upheld, unless we find that the legislature has exceeded its powers. In the case of *Greason agt. Keteltas*, (17 N. Y., 491,) SELDEN, Judge says: "The right to a trial by jury in a proper case is absolute, and any decision of the court overruling or denying such right, would be palpably erroneous." The question before the court in that case was, whether the action was an action at law, or an equitable action, the court held it to be an action at law, and that the party had the right to have the cause tried by a jury of twelve men, provided he had insisted upon such right, but the question not having been raised in time, it was deemed to have been waived; had the question been raised in time, the nature of the action was such, it being an action at law in the supreme court, no other manner of trial existed. The question of the authority of the legislature in regard to trials in justices' courts, was not in any manner brought in question, or decided in the case referred to.

The case of *Wynehamer agt. The People*, (13 N. Y., 378,) arose under the act of 1855, known as the prohibitory liquor law, by that statute courts, of special sessions were

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authorized to try criminal offenses, and pronounce judgment summarily, and the party accused, was denied the benefit of the trial by jury. The magistrate had no power to let the defendant to bail to answer at another criminal court, but he was to proceed at once and determine upon the guilt or innocence of the accused, the court decided that constitutionally, this power could not be conferred upon him. The question of the power which the people have, vested in the legislature to confer jurisdiction upon justices' courts in civil actions was not before the court in any manner, and no question has ever been raised until recently in regard to the constitutional authority of the legislature in such cases, notwithstanding the jurisdiction of these courts has been increased and extended from \$25 to \$200. The important question to be answered is what cases are referred to; the language is "in all cases, in which it has heretofore been used." The constitution provides for the organization of inferior tribunals, they can try a cause and proceed to final judgment, the nature of the action and the amount is left to the wisdom of the legislative power, justices' courts existed at the time of the adoption of the constitution of 1846, and I think, it cannot be claimed, but that the present constitution, intended to leave the power in the legislature to fix the jurisdiction, and provide the way and manner in which justices' courts shall transact business in proceeding to final judgment. I think, it cannot be successfully claimed, that if the legislature had the power to enlarge the jurisdiction of justice's courts in its discretion, from time to time, to any amount as it is conceded it may, and to give such courts jurisdiction in all civil actions so that causes may be tried before a justice of the peace, when a jury of twelve men is not called for, that in an action for the delivery of personal property of the value of one hundred dollars or under, that the section of the constitution referred to is violated, because the cause must be tried, if it can be tried in justice's court by a jury of six men. I think,

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the constitution vests the power in the legislature to establish in their discretion, the jurisdiction and the manner of the proceedings in justices' courts in all cases, where they are not prohibited from so doing, and that the section referred to was not intended to limit the power to that class of cases where justices' courts had jurisdiction by law at the time of the adoption of the constitution, and the act of 1860 is valid. Judgment affirmed.

Weymouth agt. Dimock.

SUPREME COURT.

BENJAMIN F. WEYMOUTH agt. ANTHONY DIMOCK.

In an action against a trustee of a manufacturing corporation to charge him with the liability of a debt due from the company to the plaintiff, on the ground of failure and neglect of the company to file their annual report as required by law, the allegations in the complaint that the plaintiff has recovered judgment against said company for said debt, and issued execution thereon which has been returned unsatisfied, will be stricken out as irrelevant. (*See, to the same effect, McHarg agt. Eastman, 35 How., 207.*)

New York Special Term, March, 1871.

THE complaint alleged that the defendant was a trustee of the "New York and Pennsylvania Petroleum Mining and Manufacturing Company," a corporation organized under the laws of the state of New York.

That on or about the 7th day of January, 1869, the said corporation was indebted to the plaintiff in the sum of \$2,440 33, partly for plaintiff's services as secretary and partly for moneys paid out by the plaintiff for the defendant.

That being so indebted, and the company neglecting and refusing to pay plaintiff, plaintiff commenced an action in this court upon said claim against said company, and recovered judgment thereon against said company, on the 11th day of March, 1869, for \$2,490 49.

That an execution was issued upon said judgment against said company, but was returned unsatisfied, and that said judgment remains wholly unpaid.

That said company did not file an annual report, as required by law, within the first twenty days of January in the years 1868, 1869, 1870 or 1871, and still fails and

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neglects to comply with the requirements of section twelve of the act under which it was organized, by reason of which failure and neglect, the defendant, as one of the trustees of said company, is liable for said debt of said company.

Defendant moved to strike out as irrelevant, the allegations in the complaint concerning the recovery of judgment and issuing of execution against the company.

GEO. PUTNAM SMITH, *for the motion, cited*

Witherhead agt. Allen, 3 Keyes, 562; McHarg agt. Eastman, 35 How., 207; Bailey agt. Bancker, 3 Hill, 188; Squires agt. Brown, 22 How., 35.

A. J. PERRY, *opposed.*

CARDOZO, J.—The allegations concerning the judgment and execution against the company are irrelevant. They were so held in *McHarg agt. Eastman* (35 How., 207), and must be stricken out.

Dale agt. Jacobs.

SUPREME COURT.

DALE agt. JACOBS.

Where a party made a purchase of goods on a short credit of thirty days, and within that time became insolvent, furnishing no explanation of the fact :

Held, that it was a fraudulent contracting of the debt within section 179 of the Code, and an order of arrest consequently sustained.

Special Term, March, 1871.

COUDERT BROTHERS, *for plaintiff.*

TOWNSEND, LEVINGER & WALHEIMER, *for defendants.*

DEFENDANT was arrested on the ground that a certain debt due plaintiff had been fraudulently contracted, he moved to vacate the order, which motion was denied and the following opinion delivered :

CARDOZO, J.—I do not think there is any difficulty as to this case. The goods were sold upon a short credit of thirty days, at the end of which defendants claim to be insolvent, but decline to furnish any explanation of their affairs.

Becoming insolvent so soon after the sale, it is not too much, there being no explanation offered, to believe that they were so when they made the purchases, and if that be so, they fraudulently concealed the fact, intending when they bought the goods, not to pay for them. That was a fraudulent contracting of the debt. (*Nichols* agt. *Michael*, 23 N. Y., 264.) I cannot say that the affidavits do not disclose such facts, and that the conduct of the defendants has not been such as to justify a jury in finding that the debt was so contracted. Motion denied.

Field agt. Stewart.

N. Y. SUPERIOR COURT.

HENRY M. FIELD, plaintiff, agt. JAMES STEWART and JOHN
H. MASTERTON, defendants.

No appeal lies from an order denying a motion to compel a party to make his pleading more definite and certain, and to strike out irrelevant and redundant matter contained therein.

General Term, January, 1870.

Before MONELL, FREEDMAN and SPENCER, JJ.

FIELD & SHEARMAN, *attorneys for plaintiff and respondent.*

C. W. BANGS, *attorney for defendants and appellants.*

By the Court, FREEDMAN, J.—This is an appeal from an order made at special term denying the motion of the defendants to compel the plaintiff to make his complaint more definite and certain, to state two causes of action, alleged to be contained in one count, separately, and to number the same, and to strike out irrelevant and redundant matter therefrom.

The denial of the motion was a matter resting in the discretion of the judge below, and relates to a mere matter of practice or form of proceeding; it does not involve the merits of the action or some part thereof, and the order, therefore, is not appealable. (*Whitney agt. Waterman*, 4 How., 313; *St. John agt. West*, 4 How., 329; *Bedell agt. Stickle*, 4 How., 433; *Salter agt. Genin*, 10 Abb., 478, 19 How., 233.)

Nor does the order, as made, affect a substantial right,

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for a party cannot be said to have a substantial right to what a court has a discretion to grant or withhold. The legislature must have intended, by a substantial right, a fixed, determined right, independent of the discretion of the court, and of some value. Such a right must exist, and be injuriously affected by an order, to bring a case within the third subdivision of sec. 349 of the Code. (*Tallman* agt. *Hinman*, 10 *How.*, 90.)

The appeal should be dismissed with costs.

MONELL, J.—I concur.

SPENCER, J.—I concur.

Lienau agt. Dinsmore.

N. Y. COMMON PLEAS.

MICHAEL LIENAU and others, agt. WILLIAM DINSMORE,
President of Adams Express Company.

In an action against an *express company* to recover the amount of a *draft* received by them from the plaintiffs for collection, and as alleged, the defendants neglected to collect, or to give the plaintiffs due notice of its non-payment:

Held, that before the plaintiffs can recover more than nominal damages, they must show that they could in all probability have collected the amount of the draft or some part of it from the drawee, if they had received the notice of non-payment which the defendant's duty in the premises required them to give.

The defendants having used due diligence in endeavoring to obtain payment of the draft and having failed, the plaintiffs must show that they could have done better, and that there was, at least, a reasonable probability that they could have collected the amount if they had been properly notified that the same was not paid, before they are entitled to recover the full amount thereof.

General Term, January, 1871.

Before ROBINSON, LOEW and LARREMORE, JJ.

APPEAL from a judgment.—It appears that the plaintiffs sold goods to one David Wolff, of Memphis, Tennessee, amounting to \$1,037 56-100.

On the 26th day of December, 1866, the former drew a draft on the latter for said sum payable at sight, to the order of Adams Express Company, and on the same day delivered said draft to the said company for collection.

The route of the defendants only extending to Bowling Green, Kentucky, they at said place delivered the said draft to the Southern Express Company, for collection.

The receipt given by the defendants to the plaintiffs, when the former received the draft, contained several stipulations or conditions, one of which reads as follows: "And if the said paper or proceeds is intrusted or delivered to any other express company or agent (which said Adams Express Company

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are authorized to do,) such company or person so selected shall be regarded exclusively as the agent of the depositor, and as such alone liable, and the Adams Express Company shall not be, in any event, responsible for the negligence or non-performance of any such company or person."

On the 27th of February, 1867, the plaintiffs wrote to the defendants, to the effect that they had not received the proceeds of said draft, and that if they suffered any loss by reason of the negligence of the defendants or their agents, they would hold them responsible.

On the 9th day of March, 1867, the original draft was returned to the plaintiffs by the defendants, with a note written by the agent of the Southern Express Company, which read as follows: "D. Wolff has been sick for some time. Draft presented a number of times; promised to pay 'soon.' On last presentation, Mr. W. was found to have failed in business, and says it is impossible for him to pay. "M. L. DOHERTY, *Agent*."

On the trial of this cause, a clerk of the plaintiffs testified that between the time when he left the draft with the defendants, and the time when the same was returned to the plaintiffs, he called a number of times at the office of the defendants, and inquired about the draft or the money, but was always informed that they had not heard from it, and that they would write to their agents in Memphis in regard to the matter.

This was contradicted by the evidence of a clerk in defendants' employ.

The court instructed the jury that if they believed the testimony of plaintiffs' clerk, the plaintiffs would be entitled to recover the full amount of the draft.

To this charge defendant's counsel excepted, as also to the refusal of the court to charge that upon the evidence the plaintiffs were entitled to recover only nominal damages.

The jury, thereupon, found a verdict for the plaintiffs,

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for the full amount of the draft, with interest from its date.

The defendants appealed.

BLATCHFORD, SEWARD *and* DA COSTA, *for defendants and appellants.*

T. S. ALEXANDER *and* R. P. LEE, *for plaintiffs and respondents.*

By the court, LOEW, J.—An express company may be deemed a common carrier, and like the latter, may restrict or limit their liability by express contract, but it may well be doubted whether they can do so by a mere printed notice or condition on the receipt, which the party sending goods by, or otherwise employing them, may or may not have seen. (*Dorr agt. The N. J. Steam Nav. Co.*, 11 N. Y., 485; *Bissell agt. N. Y. Central R. R. Co.*, 25 N. Y., 445; *Belger agt. Dinsmore*, 34 How., 421.)

Assuming, but without deciding, that the defendants in this action could not thus limit their responsibility, or if they could, that the plaintiffs are correct in their views, and that the defendants, by their subsequent acts, must be deemed to have waived the conditions in the receipt, which they claim, exempts them from all liability for the negligence of the Southern Express Company, to which they transferred the draft, and that they are estopped from saying that they passed the same over to said company, still I do not see how this judgment can be sustained.

It was admitted by the plaintiffs in their complaint, and also by a certain stipulation signed by their attorney, and read on the trial, that within a few days after the delivery of the draft to the defendants, and as soon as the same could be transmitted to Memphis, to wit, on or about the 31st day of December, 1866, and repeatedly thereafter, the agent of the Southern Express Company presented said draft for payment to the drawee; that payment thereof was repeat-

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edly demanded, and that the said drawee neglected and refused to pay, although he repeatedly promised to do so.

It thus appears to be conceded by the plaintiffs themselves, that the defendants did all that could possibly be asked or required of them in regard to transmitting the draft to Memphis, and presenting the same to and demanding payment thereof from the drawee.

Now, the evidence on the part of the plaintiffs shows, that they never requested the defendants to return the draft, nor did they surrender the receipt and pay the charges, all of which was necessary, according to the terms of one of the clauses in the receipt, before the defendants could be required to return the said draft, and it may, therefore, be questionable whether they were bound to do so. (*Newstadt* agt. *Adams*, 5 *Duer*, 13; *Manhattan Oil Company* agt. *Camden Railroad*, 5 *Abb.*, N. S., 289; *Bostwick* agt. *The Baltimore and Ohio Railroad Company*, 55 *Barb.*, 137.)

However that may be—for, as already intimated, there are also authorities to the contrary—it is quite clear that the defendants should, at least, have given due notice to the plaintiffs of the non-payment of the draft, and not having done so, they must be held liable to the plaintiffs for all damages sustained by them by reason of their negligence. But it seems to me that before the plaintiffs can recover more than mere nominal damages, they must show that they could, in all probability, have collected the amount of the draft, or some part thereof, from the drawee, if they had received the notice of non-payment, which the defendants' duty in the premises, required them to give. (*Allen* agt. *Suydam*, 20 *Wend.*, 327 to 331.)

The defendants having used due diligence in endeavoring to obtain payment of the draft and having failed, the plaintiffs must show that they could have done better, and that there was at least, a reasonable probability that they could have collected the amount of the draft, if they had been

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properly notified that the same was not paid, before they are entitled to recover the full amount thereof.

But having done that, I think they would be *prima facie* entitled to a verdict or judgment for that amount, and the onus would then be upon the defendants to prove, that the real loss or damages sustained by the plaintiffs, in consequence of the negligence imputed to them was not the whole amount of the draft. There is not a particle of evidence in the case to show that payment of this draft or any part thereof, could have been obtained, either by legal proceedings or otherwise, between the time when it was first presented to the drawee for payment and the time when the plaintiffs were notified of its non-payment.

From the facts and circumstances of the case, the probabilities seem to me to be all the other way.

In my opinion, the jury should have been charged as the chancellor thought they should have been instructed in *Allen agt. Suydam (supra)*, viz.: that upon the evidence the plaintiffs were only entitled to nominal damages; or at least they should have been told to find only such damages as they should from the evidence believe it probable that the plaintiffs might have sustained by reason of the delay of the defendants in notifying them of the non-payment of the draft.

The judgment should be reversed and a new trial ordered, costs to abide event.

LARREMORE, J.—Concurred.

Central Bank of Westchester Co. agt. Alden.

SUPREME COURT.

THE CENTRAL BANK OF WESTCHESTER COUNTY agt. JAMES
M. ALDEN, JAMES T. ROGERS and another.

By the Code (§ 412) *service of notice of trial by mail* may be made sixteen days before the day of trial, including the day of service: and such service is good, although the last (16th) day falls on *Sunday* before Monday for which the cause is noticed. Therefore service made by mail, on the 4th of the month, for trial on Monday the 20th, is good.

It seems that the second subdivision of section 407 of the Code, providing for the computation of time, that "if the last day be Sunday it shall be excluded," does not apply to notice of trial by jury.

Westchester Special Term, April. 1871.

MOTION by defendants to set aside judgment and inquest taken against them by the plaintiffs, for irregularity.

WILLIAM H. SECOR, *for the motion.*

This is a motion made to set aside and vacate a judgment in this action, taken by default by the plaintiff herein, upon the ground that the judgment is irregular and void, for want of the necessary number of days "notice of trial" when served by mail. The time within which to do an act, to serve the same, when so served, requiring, under the Code of Procedure, sixteen days notice of the trial, before the day of trial mentioned in said notice, and excluding the day of trial.

The said notice was dated the 4th day of March, 1871 (Saturday), and according to the showing of the plaintiff's attorney mailed and so served on that day.

That said notice also contains the information and notice

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that the trial would be had on the third Monday inst. (20th) in said county.

Therefore making the 19th of March (Sunday) his last day in computing sixteen days of time, fall upon and include Sunday as his last day in said computation of time by the plaintiff's attorney, was *dies non*.

I. It is unnecessary to urge in this connection, or offer authorities thereon, that the act of the notice of trial, when an appearance has been given, an affidavit of merits been filed, and an answer (denying the complaint) is served, that the notice of trial, unless waived by a trial, is a substantial right, which the moving party is required to serve upon the opposing party within a determined time, fixed by law, when said party desires to bring the cause to trial; or, like as in this instance, the defendant should have been served, the "notice of trial" and the sixteen days to be embraced as time, when served by mail, as prescribed in section 407, for ascertaining days and computing the same, and section 412, for making the service and the manner of making such service, and ascertaining therein the day to commence the computation of time.

In support of the same. (*Wolf* agt. *Horton*, 3 *Caine* 86; *Campbell* agt. *International Life Ass. Co.*, 4 *Bosw.*, 298-310, *General Term*, N. Y. *Superior Court*.)

II. Section 407, Code of Procedure, time how computed. Subdivision 1. The time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last.

Subdivision 2. If the last day be Sunday, it shall be excluded.

Section 412. When the service is by mail, it shall be double the time required in cases of personal service, except service of notice of trial, which may be made sixteen days before the day of trial, including the day of service.

You here include the first day and include the last, if not Sunday, in computing sixteen days before trial.

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III. The plaintiff's attorney, by his own showing, served the "notice of trial" by mail, on the 4th day of March, 1871, the notice itself bearing the same date on its face, thereby electing to commence his service on that day, thereby computing the 4th day of March as his first day, and the 19th day of March (Sunday) as his sixteenth and last day, therefore, giving the defendants but fifteen days' notice before the day of trial, the 20th day of March, so designated by the plaintiff's attorney, in his said notice of trial. The 19th day of March was Sunday, and excluded under § 407, and the day of trial cannot be computed under § 412 of the Code, as that section precludes it, therefore, this defendant had but fifteen days' notice of trial, before the day of trial.

The distinction and difference between a notice of trial served by mail is, that you include the day of service, to wit, when placed in the post-office, and exclude the last day before the day of trial "only," when it is Sunday, when it is elected, to serve sixteen day's notice of trial by mail. Therefore, had the plaintiff's attorney so served and dated his notice of trial on the 3d day of March, there would have been sixteen days' service of notice of trial—herein.

Evidently the plaintiff's attorney computed dates of days, and not the days of dates, in his calculations.

Having so elected to proceed, such proceeding was irregular and insufficient on its face, and the inquest taken, and the judgment entered therein on the 21st day of March, 1871, is void and illegal. (*Jenks agt. Payne*, 15 *Johns.*, 398; *Gillilan agt. Morrell*, 1 *Caine*, 156; *Wolf agt. Horton*, 3 *Caine*, 86; *Campbell agt. The International Life Ass. Co. of London*, 4 *Bosw.*, 298, *General Term*, N. Y. *Superior Court*.)

Judge HOFFMAN says, in delivering the opinion of the court, in the last case, that § 407 of the Code of Procedure

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furnishes a definite rule for all cases within the provisions of the Code of Procedure, for the days to be computed, and to be used in the noticing of time, and says, if Sunday is the last day, it shall be excluded.

IV. That immediately upon the receipt of the said notice of trial, and upon the same day, the attorney for this defendant (Alden,) returned the said notice of trial to the plaintiff's attorney, with sufficient reasons for the return of said notice of trial, properly indorsed thereon.

And on the 22d day of March, (the day when service was made on defendant's attorney, at his office, New York city, of the notice of the entry of judgment, and the notice that the costs had been taxed, and the notice of the re-adjusting of the same for the 27th day of March, 1871, at 9 o'clock in morning of that day, at White Plains,) defendant's attorney returned the same day as received, to the plaintiff's attorney, the said notice of entry of judgment, taxation, and the re-adjustment of costs with sufficient reasons for the return thereof properly indorsed thereon, thus showing and exhibiting his good faith, and not misleading the plaintiff's attorney. (*Fassett* agt. *Dorr*, 11 *Wend.*, 178; *N. Y. Central Ins. Co.* agt. *Kelsey*, 13 *How.*, 535; *Elliott* agt. *Kennedy*, 26 *How.*, 424) The papers were not returned in this last case, thereby showing want of good faith, &c.

V. Therefore this motion should be granted in that the judgment taken herein, be set aside and vacated with costs, and an order entered to that effect.

ODLE CLOSE, *opposed.*

GILBERT, J.—The plaintiff served the notice of trial in this action by mail, and dated and mailed said notice on Saturday, the 4th of March, for "sixteen days'" notice of trial, the case being noticed for Monday, March 20. Defendants' attorney returned notice of trial for irregularity,

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claiming "fifteen days only" being given, as Sunday, the 19th, could not be included in the sixteen days, according to section 407 and section 412 of the Code. Plaintiffs took an inquest. This motion was made to set aside the judgment as irregular and void—no sufficient "notice of trial" having been served. Sunday, the 19th, should be included in computing the sixteen days, and the motion is denied accordingly.

Matter of Eager.

SUPREME COURT.

*affirmed
12 Oct - N.S. 151
H6 reg. 100*

In the matter of the petition of LAURA E. EAGER and others, to vacate assessments for paving Irving Place from 14th to 20th street, 19th street from Third to Sixth avenue, and 16th street from Fourth avenue to Rutherford Place with Nicolson pavement.

It has been heretofore held by this court, that the act passed April 26th, 1870, authorizing the court to deduct any unlawfully increased assessment in street cases in the city of New York, &c., does not apply to cases which had arisen before the passage of the act, but that such act was prospective only in requiring the amount erroneously assessed to be deducted.

Where the resolution and ordinance requires streets to be paved with Nicolson pavement, and that *cross-walks be laid or relaid* at intersecting streets, it is irregular not to lay such cross-walks as directed by the ordinance, and yet charge upon the owners of lots the cost of laying them. It is a fraud upon the lot owners, which entitles them to relief under the act of 1858.

The charge of two and one half per cent. for *collecting*, is not erroneous. The statute gives that amount on moneys collected. This charge, as well as the cost of the work, has to be raised by an assessment on the property and the whole sum, when collected, is paid into the treasury. The statutes evidently give the percentage on the whole amount assessed and collected.

There is no authority given by statute authorizing an assessment, to include in the contract an allowance to contractors for extra compensation, if the work is done *before the time fixed in the contract*.

New York Special Term, April, 1870.

THESE proceedings were brought to vacate assessments imposed on the property of the petitioners for paving Irving Place, 19th and 16th streets with Nicolson pavement under the acts in relation to frauds in assessment, for local improvements in the city of New York.

The resolutions and ordinances relative to each street, provide that the streets be paved with Nicolson pavement, where not already paved with Belgian pavement, and cross-

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walks laid or relaid at intersecting streets. No cross-walks were laid or relaid at the intersection of Irving Place with 16th or 19th street.

The advertisements issued by the Croton aqueduct department, called for proposals and bids for contracts for laying the Nicolson pavement, which is a patented article, and the Nicolson Pavement Company have the exclusive right to lay it in the city of New York. Only one bid for each street was received, which was made by the Nicolson Pavement Company, and the contracts were made with that company to do the work.

This company laid in the three streets, cross-walks or bridge stones, the charge for laying which, exceeded in each street, the sum of two hundred and fifty dollars. In the advertisement for proposals for bids there was no mention of cross-walks.

In each of the assessment lists there was included a charge of three dollars and fifty cents per day for each day the work was completed prior to the time agreed upon in the contract.

It appeared from the testimony of John T. Tully, secretary of the board of assessors, that the charges for the collection of the several assessments, exceeded the two and one half per cent. allowed on the items of the assessments after deducting therefrom the item for collection. The ordinance of the common council allows to the collector and his deputies, an equal part of two and one half per cent. on all items of assessments collected by the bureau for the collection of assessments during their term of office, and of two per cent. on all unpaid items of assessments returned during their term of office to the bureau of arrears. The estimate of the cost of collection was based on the supposition that the whole amount of the assessment would be received by the collector during the years the assessment is in his hands, and therefore that he would be entitled to two and one half per cent. on the whole amount instead of but two per cent.,

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which he is authorized to receive for the sums not collected by him.

And it appeared that the collector of assessments, not only had two and one half per cent. upon the expenses, but also the same per centage on his own fees. These proceedings were instituted in February, 1870, and the testimony taken from time to time, prior to April 13th. On the 20th of April, 1870, the cases were argued before Mr. Justice BRADY, at special term, who rendered the following opinion:

ABRAHAM R. LAWRENCE, Jr., *for petitioners.*

A. J. VANDERPOEL, *for the Mayor, Aldermen, &c.*

BRADY, J.—There are two objections taken to the assessments imposed upon the lands of the petitioners, which are well taken.

First. The charge for cross-walks of stone, none having been laid, and none others having been authorized.

Second. The charge for collection in excess of two and a half per cent. allowed by law. These charges are legal irregularities within the decisions of this court, relative thereto, and the assessments must be vacated under the act of 1858. (*Laws of 1858, p. 574, § 2; Matter of Wood, 51 Barb., 276; Matter of Lewis, 35 How., 162; Matter of Babcock, 23 How., 118; Matter of Beams, 17 How., 459; Matter of Buhler, 19 How., 317; Matter of Wm. B. Astor, MS.*)

Section 27 of the Act of 1870, chap. 383, passed April 26, 1870, might render these objections valueless, but that act was not passed when these applications were heard; has no retroactive effect, therefore, and the irregularities under its provisions cannot be remedied. I have examined all the points submitted in reference to the proceedings for the assessments objected to, and my judgment is that none of them, except those embracing the items mentioned, are well taken.

I deem it unnecessary to say anything further in deciding

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these applications, except that the principles upon which the assessment is made is not the subject of review under the act of 1858, *supra*. If erroneous, it is not a legal irregularity within the meaning of that act. The land of the petitioners and others subject to assessment for the improvement made may, therefore, be again assessed, as provided by the act of 1858, *supra*, the charge for cross-walks and the charge for collecting already considered, being excluded from the expenses of the improvement and the expenses of the new assessments being also excluded.

From the order entered on this decision, the Mayor, Aldermen and Commonalty appealed to the general term of this court.

A. J. VANDERPOEL, *counsel for appellants.*

A. R. LAWRENCE, Jr., *counsel for respondents.*

By the court, INGRAHAM, P. J.—We have heretofore held that the act of 1870 did not apply to cases which had arisen before the passage of the act, but that such act was prospective only in requiring the amount erroneously assessed to be deducted. There can be no doubt of its having been irregular not to lay the cross-walks as directed by the ordinance, and yet to charge upon the owners of lots the cost of laying them. The cost of laying Nicolson pavement was \$4 95 per square yard; the cost of the bridge stones was \$1 30 per foot—nearly three times more than the wooden pavement. It would not require any great stretch of the imagination to find that such a charge was a fraud on the lot owners, which entitles them to the relief sought. The charge of two and one half per cent. for collecting was not, in my judgment, erroneous. The statute gives that amount on moneys collected. This charge, as well as the cost of the work, has to be raised by an assessment on the property, and the whole sum when collected is

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paid into the treasury. The statutes evidently give the percentage on the whole amount assessed and collected. It may well be doubted whether the contract was properly made to include an allowance to contractors for extra compensation if the work is done before the time fixed in the contract. No such authority is given by the statute authorizing the assessment, nor does the ordinance directing the improvement provide for it. We see no authority for the department to agree to pay extra sums to the contractor, not for doing the work, but for doing it quicker than he would otherwise do it. It is opening a door for abuses which, by extending the time for completing the work, may give to a contractor large sums of money for which he would render no equivalent.

Order appealed from affirmed.

In re Carow.

U. S. DISTRICT COURT.

In re CAROW.

An adjudication of bankruptcy terminates the interest of the bankrupt in any policy of insurance, and the policy is thenceforth void and of no effect; but an insurance company may consent to continue their liability by the usual transfer of the policy to the register in charge of the bankruptcy proceedings, until an assignee shall have been appointed, and may also transfer said policy to the assignee when appointed. It is optional with the company to continue the risk by such transfers, or to cancel the same.

The title to the property of a bankrupt, by operation of law, vests in the register as register, although the property may be in the possession of the U. S. marshal as messenger, it is still in the possession of the court, and the register is, by the bankrupt law, the court or trustee.

The U. S. marshal and assignee or trustee are officers of the court, and must obey the order of the register, and their necessary expenses and disbursements made by them in the protection of the property of the bankrupt's estate must be taxed by the register and paid out of the estate.

Southern District of New York.

Before JOHN FITCH, Register—This cause is now pending before me. The said Carow has been duly adjudicated a bankrupt by the district court. The United States marshal, as messenger, has seized, attached, and has in his possession, under the order of this court, three ships, claims of indebtedness to the bankrupt and other property, claimed by creditors to be the property of the estate of the bankrupt. It is satisfactorily shown to me by creditors and by the United States marshal, that these ships are estimated to be worth from eighty to one hundred thousand dollars or more, subject to liens and incumbrances. It appears by the schedules of the said bankrupt that the said three ships were previously insured in various companies, and that notes of the bankrupt were given in payment of said insurance,

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which notes have not been paid, and are set out in said schedule as part of the indebtedness of the said bankrupt.

I decide, as a matter of law, that the adjudication of this court, declaring the said Carow a bankrupt, ended the liability of the companies upon their policies unless they saw fit, at the request of the register in bankruptcy, or the United States marshal as messenger, in writing, to consent to continue their liability under said policies by the usual consent and transfer of said policies from the said Carow to the said register or marshal, on account of the creditors of the estate, until an assignee shall have been appointed, and then it would be optional with the companies to continue the risks by transfers to the assignee or to cancel the same.

The interest of the assured in a policy ceases with any transfer thereof. An adjudication of bankruptcy by operation of law transfers the interest of the bankrupt in a policy to the register. The policy is not assignable without the consent of the company in writing. The assignment of the policy to the register to be of any benefit to the estate, must be with the consent of the company in writing, and without such consent the policy, after such adjudication, would be void and of no effect, as an assignment without consent of the company, avoids the policy. (*Smith agt. The Saratoga County Mutual Fire Ins. Co.*, 1 Hill, 497.)

It is not necessary that the bankrupt should *pro forma* assign the policy to the register, as the register takes it by operation of law.

The filing of a petition in bankruptcy at once brings the property of the insolvent into the bankruptcy court, and places it in its custody and under its protection as fully as if actually brought into the visible presence of the court.

I hold it to be my duty, and that I am required by law, to protect the interest of the creditors, or by an order of this court to direct the United States marshal to cause the said ships to be properly insured, in safe and responsible in-

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insurance companies, as by the bankrupt law the title of the property and estate of the bankrupt upon the adjudication and order of reference to the register, by operation of law, at once vests in the register as register; and although in the actual possession of the United States marshal as messenger, it is still in the possession of the court, and he will be protected in his obedience to its orders by the court. His expenses, disbursements and costs are taxed and allowed by the register (*rule 5*). The register has the power to order the payment of fees and expenses incurred in the proceedings out of the funds in the hands of the assignee. (*In re Lane*, 2 B. R., 100). He may appoint a watchman to take charge of the property. (*In re Bogert et al.*, 2 B. R., 178; *In re Shafer et al.*, 2 B. R., 178.) He is authorized and required to receive the surrender of property and keep it safely until it can be turned over to the assignee. (*In re Hasbrouck*, B. R., *Sup.*, 17.) In this case the money necessary to pay for the insurance will have to be advanced by the marshal, and be allowed to the marshal in his bill of costs, with a fair compensation for the use of it, to be allowed and taxed by the register and paid out of the proceeds of the estate.

I hold it to be the duty of the register to exercise a sound discretion in regard to the direction to be given in regard to estates in bankruptcy, that all insurable property should be properly insured and properly cared for in every respect; that the register is as it were, the guardian and protector of the property in the possession of the court, and under its control, and the marshal as an officer of the court, is also under its control, as it was held in the case of *In re Glaser* (1 B. R., 73); BLATCHFORD, J., that district courts had original jurisdiction in all matters and proceedings in bankruptcy, and that that jurisdiction extends to all acts, matters and things to be done under and in virtue of the bankruptcy. The estate surrendered is placed in the custody of the court so sitting in bankruptcy, and the officer

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(assignee or trustee), appointed to manage it, is accountable to the court appointing him and to that court alone. (*In re Barrow*, *In re Loeb*, *Simon & Co.*, *In re Winter*, 1 B. R., 125; *In re Schnepf*, B. R. Sup. XLI.; *In re Bowie*, 1 B. R., 185.) The commencement of proceedings in bankruptcy at once transfers to the district court the jurisdiction over the bankrupt, his estate and all parties and questions connected therewith. (*Jones agt. Leach et al.*, 1 B. R., 165; *Pennington agt. Sale*, *Phelan et al.*, 1 B. R., 157; *In re Kingon*, 38 How., 392, and the authorities there cited.)

The United States marshal, as messenger, is an officer of the court, and subject to its authority and control, and must obey its orders and directions as such officer can for the interests of the creditors, and also have a care that the interests of the bankrupt shall be protected, and that his property shall be so managed as to realize the largest amount attainable, both for the interest of the creditors, and that the bankrupt may, by such judicious management of his property and effects, come within the provision of the fifty per cent. clause. In order to afford the marshal, as messenger, full protection and guaranty by order of the district court from loss by reason of his advance for premiums upon the policies of insurance, I propose to grant the following order in this cause :

“That the United States marshal cause to be insured the three ships, now in possession under and by virtue of an order of this court, viz.: *Polar Star*, *Tri-Mountain* and *Edith*; that he cause to be insured the *Polar Star* at the sum of sixteen thousand dollars, the *Tri-Mountain* at twenty-six thousand dollars, and the *Edith* at forty-five thousand dollars, or as near those sums as he can procure insurance on them respectively, in safe, solvent and responsible insurance companies in the state of New York, upon reasonable and proper terms as to rates of insurance, for the space of two months.”

Which, as the order of this court, will afford the marshal

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ample protection, and at the same time secure the creditors the value of the property, in case of loss, and also secure the other claimants and all those having prior liens or admiralty liens which may have become vested rights prior to the adjudication in bankruptcy. In any event the policies should be so worded as to cover the interests of all concerned.

As this is a question as to the power of the register in involuntary cases to cause proper care to be taken of property, I ask the direction of the district court as to the issue of the order to the United States marshal, as the marshal desires the protection and direction of the court in this matter, there being adverse claimants of the property to be insured, and the attorneys for the bankrupt claim that the bankrupt had neither right, title nor interest in the ships, and that this court in bankruptcy has not, by any proceedings in this cause, acquired any jurisdiction over the same.

BLATCHFORD, J.—If the marshal, as messenger, has these ships in his possession and actual custody as the property of the bankrupt, it is proper they should be insured in such sums and for such time as shall seem to the register proper. In that view and on the certificate of the register, the annexed proposed order is approved.

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SUPREME COURT.

JOHN C. STRONG, appellant, agt. JAMES F. EIGHME and others, respondents.

A county court has jurisdiction of an action to foreclose a mortgage, which contains, in addition to the premises described and situated in its own county, lands described and situated in another county.

Fourth Judicial Department, January Term, 1871.

Present, MULLIN, P. J., TALCOTT and JOHNSON, JJ.

APPEAL from a judgment of the county court of Erie county, dismissing the complaint for want of jurisdiction.

JOHN C. STRONG, *in person*, appellant.

The Code confers a general jurisdiction on the county court for the foreclosure of a mortgage, and the sale of the mortgaged premises situated within the county, and the court of appeals have decided the jurisdiction to be constitutional and valid. (*Code*, 530; *Benson* agt. *Cromwell*, 6 *Abb.*, 83; *Arnold* agt. *Rees*, 17 *How.*, 35; 18 *N. Y.*, 57; 16 *N. Y.*, 80.)

1. The complainant, in this case only asks the foreclosure of the mortgage upon the lands therein specified in Erie county. There is no qualification whatever to the general jurisdiction conferred on the county court.

2. The defendant Umlauf, the only one who has answered in the case, reads this statute confirming general jurisdiction with this qualification: "If the mortgage sought to be foreclosed also covers land in another

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county, the county court has no jurisdiction to order a sale of the lands in Erie county."

3. There is no such qualification in the statute. It is not an act of construction to insert it, but an act of legislation.

4. Suppose I loan a man \$10,000, and take his mortgage upon a house and lot in Buffalo, and also on his house and lot in Fort Erie across the river, in Canada. If I cannot foreclose upon the house and lot in Erie county because the mortgage also covers property in Canada, the mortgagee is remediless. For Canada is as much a foreign jurisdiction to the supreme court, as another county is to the county court. If the position taken in this case is sound, it would follow that neither in the American or Canadian courts could the mortgage be foreclosed at all.

II. The equities of the plaintiff are all admitted. The defendant Umlauf, the only defendant who answers, has shown no standing in court giving him a right to raise any question whatever in the case.

1. His answer is a virtual judgment creditor's bill against his co-defendant, Isaac Eighme. He does not show that he ever issued any execution against his judgment-debtor, Isaac Eighme, or had acquired in any way an equitable lien upon his assets.

a. He avers that when he recovered his judgments Isaac Eighme was in the possession of the lands and premises covered by the plaintiff's mortgage. Then he avers he was the equitable owner of the same. These are all his averments against his judgment debtor, Isaac Eighme.

b. He does not aver that Isaac Eighme ever held the legal title to the lands, or that his judgments were ever a lien thereon, or that he ever has acquired or taken the legal steps to acquire a lien upon the equitable interests of Isaac Eighme, which are the only ones he pretends he has in the lands covered by the plaintiff's mortgage.

III. The foreclosure in the county court would give full

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and perfect relief according to the rights of all parties. It would be a bar against any second foreclosure of this mortgage upon the lands it covers in Cattaraugus county. The plaintiff, in such a case, will never foreclose his mortgage in the county court, except where the lands in the county are, in his judgment, as in this case, a fair and adequate security for the mortgage money. (16 *Johns.*, 136; 15 *Johns.*, 229; 1 *Wend.*, 487; 8 *Wend.*, 492; *Smith's Leading Cases*, 669; 42 *Barb.*, 270.)

1. The finding of the judge shows the whole amount of the mortgage money is due, and of course any second suit for the foreclosure of the same mortgage would be barred.

We submit, therefore, the learned judge erred in dismissing the plaintiff's complaint.

S. P. PERKINS, *for respondent.*

I. The county court was correct in deciding to dismiss the plaintiff's complaint in this action, because,

1. The mortgage in suit, covers real estate situate in two different counties of this state, only a portion of which is situate in the county of Erie, where alone said Erie county court has jurisdiction in any matter, suit, or proceeding.

2. Because county courts of this state, are courts of limited jurisdiction, all their powers and duties are carefully defined and prescribed by statute. This court has no *original common law* jurisdiction whatever. Section 30 of the Code of Procedure, carefully limits and defines, in what particular actions and proceedings, the county court of each of the several counties of this state can exercise its jurisdictional functions. It will be seen by a reference to this section of the Code, that the powers and jurisdiction of this court, as separately defined, in each and all of the thirteen subdivisions of said section, are co-extensive only with the limits of the county.

3. Because by the third subdivision of said section 30 of

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the Code, county courts are specifically limited in actions to *foreclose* and *satisfy mortgages*, to mortgaged premises lying or situated *within* the county, and the collection of any deficiency of *the mortgage* remaining unpaid after the sale of *the mortgaged* premises, that is, the premises within the county, and not out of it, clearly.

4. Because it was clearly the intention of the law making power, in thus limiting and defining the power and territorial jurisdiction of this court, to erect a barrier, which would serve to prevent any clash or conflict of jurisdiction, not only between the several county courts of this state, but also between it and those courts exercising original jurisdiction.

5. Because in the case at bar, the mortgage in suit, contains a clause which at once calls upon the court to make a decree affecting property described in the mortgage outside the limits of Erie county. To illustrate, suppose in the light of this *clause* contained in the mortgage referred to, that the county court of Erie county had decided that it had *jurisdiction* to entertain said action, and had gone on to make a decree in accordance with the terms and conditions therein contained? What would it have been? Why, most certainly, it would have decreed in the *first* place, a foreclosure and sale of the premises lying in *Erie county*; and *secondly*, that before the lands in Erie county could be sold under such decree, the appellant must first go into *Cattaraugus* county, and there invoke the jurisdiction of some competent judicial tribunal, to grant him a decree of foreclosure and sale of the premises situated in the latter county, first described in said mortgage, and to sell the same at a judicial sale under such decree as he might obtain, and for the best price it would bring; and then, *thirdly*; that if there should remain any deficiency after such sale, he would be permitted to resort to the sale of the premises *secondly* described in said mortgage, situate in Erie county; and then *fourthly*, after the sale of the last parcel named if

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there still remained a deficiency, the appellant would be allowed to sell the last parcel described in said mortgage and so on, until all the mortgaged premises were exhausted; and lastly, if there still remained a deficiency a judgment over of course against the maker of the bond for the amount ascertained on the coming in of the report of the referee for confirmation.

II. The county court, being therefore a court of limited jurisdiction and powers, can only act within certain prescribed limits created by statute. By section 14, of article 6, of the constitution of this state, it is provided, that county courts shall have such jurisdiction as the legislature may prescribe; but shall have no original civil jurisdiction except in certain special cases. The special cases are limited and defined by section 30 of the Code *cited*, therefore,

1. By subdivision three of said section 30, it is clear that in all cases, where lands described in one mortgage, are situated in different counties of the state, the county court of neither of the counties in which any of these parcels are situated, have no jurisdiction to entertain an action brought to foreclose said mortgage. It is claimed by the appellant, that in a case where one mortgage covers for instance, one parcel of land in Erie county, another in *Monroe*, and still another in *Cattaraugus* county, that the county courts of these several counties would each have jurisdiction to entertain an action to foreclose said mortgage, so far as the same related to the lands and premises situated within the limits of their respective counties. In other words, that the mortgagee has a right in such a case, to bring as many *actions* to foreclose his mortgage, as there are different counties containing lands covered by it, and hence

2. It would follow as a matter of course, that the party in such a case could, and indeed would, be entitled to recover as many bills of cost, as he had suits. It is clear then,

3. That such an exercise of power and jurisdiction on the part of county courts, would be in direct conflict with the

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intention of the law making power, as well as contrary to *public policy*.

III. It will not be claimed by the appellant in the case at bar, that by the foreclosure and sale of the lands embraced in the mortgage in suit, lying in *Erie county*, that he thereby *abandons* and *waives* his *lien* on the lands in *Cattaraugus* county, embraced also in the same mortgage—neither can it be claimed as a matter of law, that a judgment in foreclosure of the lands in the former county, would operate as a bar to the foreclosure and sale of the lands in the latter (*Cattaraugus*) county, for any deficiency which should be found, after the sale of the premises *in* the former county.

1. There is no claim or pretense set up in the appellant's complaint, nor was it claimed on the trial that he had, by commencing his action to foreclose on the lands in *Erie* county alone, thereby *waived* or *abandoned* his *lien* upon the lands embraced in said mortgage lying in *Cattaraugus* county.

2. The appellant claimed and insisted on the trial of this action that as a matter of law, he had a right to foreclose his mortgage in each and both of said counties, in the county courts thereof, or in the supreme court as he might elect.

IV. The supreme court, is the only court of this state which has jurisdiction to entertain an action to foreclose a mortgage which embraces and covers lands lying in *more* than *one* county. By section 123 of the Code, the trial must be had in the county where the subject, or *some part thereof* is situate. By section 132 of the Code, it provides for filing *notice lis pendens* in *every county* in which real property affected by the action is situated—and particularly refers to foreclosure of mortgages.

V. It is well settled that these statutes regulating and defining the powers and jurisdiction of county courts in this state, must be strictly construed in all cases.

VI. By section 148 of the Code, an objection to the *jurisdiction* of the court, can always be taken on the trial of the action.

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We, therefore, claim that the judgment in this action should be affirmed, with costs.

VII. On appeal, the respondent is entitled to the benefit of any presumption which will uphold the decision in the court below. (*Mead agt. Bunn*, 32 N. Y., 275; *Carman agt. Pultz et al.*, 21 N. Y., 547; *Grant agt. Morse*, 22 N. Y., 323; *Hoyt agt. Hoyt*, 8 Bosw., 511; *President, &c. of Lee Bank agt. Satterlee*, 4 Robts., 1.)

By the court, TALCOTT, J.—The complaint in this action was upon a mortgage, described as covering certain lands in Erie county, and sought a foreclosure and sale of the same, in the usual form, without stating that the mortgage embraced any other lands. One Umlauf, made a party defendant as a judgment creditor, alone answered, but did not allege that the mortgage covered other lands than those specified in the complaint, or claim any rights upon which that circumstance has any material bearing.

On the trial it appeared that the mortgage also covered certain lands in Cattaraugus county. Whereupon, and as is stated in the judgment, "for that reason solely," the complaint in the action was dismissed upon the ground that the court had no jurisdiction to entertain the action or grant the usual decree of foreclosure. In this we think the court below erred. As the constitution now stands the county courts have such original jurisdiction as may be conferred upon them by the legislature.

The legislature has, with others, conferred upon the county courts by the 30th section of the Code, the following jurisdiction, viz.:

"3. The foreclosure or satisfaction of a mortgage, and the sale of mortgaged premises, situated within the county, and the collection of any deficiency on the mortgage remaining unpaid, after the sale of the mortgaged premises."

Where the plaintiff seeks a strict foreclosure and a part of the mortgaged premises are situated within the county,

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or where he desires only a sale of the premises situated within the county, although the mortgage may embrace other premises, we do not see why the county court has not jurisdiction within the above provision of the Code, and the section 123 regulating the place of trial. The provision above quoted may well be supposed to have contemplated the exercise of such jurisdiction, as the limitation is not to entertain suits for the foreclosure and satisfaction of mortgages upon lands situated within the county, but that power is left general, while the restriction to lands in the county is confined to the power of sale.

If the plaintiff is willing to resort only to the lands situated in the county for the satisfaction of the mortgaged debt, and there are no reasons rendering such a resort, in the first instance, inequitable, we do not see why he may not do so. In such case he will not be entitled to a decree over, against the person for a deficiency arising on the sale, as such decree can only be granted after a sale of all the lands covered by the mortgage. He cannot, after having obtained a decree in such case, commence another action upon the same mortgage in another county court, or in the supreme court, for to such an action a plea of *transit in rem judicatam* would be an answer. If any reasons exist rendering a resort to the lands lying within the jurisdiction of the court in which the action is commenced, in the first instance inequitable, as the court in such case, could not give the relief to which the defendant would be entitled, the action must be dismissed, and in such case, as a general rule, at the plaintiff's expense, but without prejudice.

We observe that the respondent states in his points, that the mortgage in question, expressly provides, that the Cattaraugus lands shall be first sold before a resort can be had to the lands in Erie county, but this fact no where appears from the record, and we cannot go out of the record for the facts. The judgment of the county court must be reversed and a new trial ordered, costs to abide the event.

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N. Y. SUPERIOR COURT.

LOUIS CHAMBORET and ELIZA CHAMBORET, plaintiffs
and respondents, agt. JAMES CAGNEY, defendant and
appellant.

In an action for unlawfully and wrongfully taking and carrying away certain goods, chattels, household furniture, wearing apparel and jewelry, the property of the plaintiffs, of the value of \$4,170, and that the defendant converted and disposed of the same to his own use, to plaintiffs' damage, \$5,000. And the answer of the defendant contains specific denials, putting in issue every material allegation of the complaint, and also a *counter-claim* for the recovery of \$350, damages alleged to have been sustained by the defendant by reason of the plaintiffs making default in the performance of the condition contained in a chattel mortgage, executed by the plaintiffs to the defendant upon said property, and the defendant, thereupon, took possession of so much of the property as he could find, but plaintiffs had before that time, secreted and removed a part thereof, which could not be found; that it was subsequently discovered that the plaintiffs had no title to a part of the property taken by the defendant, although included in the mortgage, and the same was replevied and taken from the possession of the defendant by the true owners thereof, whereby the defendant sustained loss to the amount of \$350, for which amount he demands judgment against the plaintiffs:

Held, that this counter-claim is not connected with the trespass upon which the plaintiffs rely, nor can it be claimed that it arose out of the transaction set forth in the complaint, and that it cannot be upheld, without a great stretch of the meaning of the words "subject of the action," beyond their true and proper significance.

It seems, that under subdivision 1 of section 150 of the Code, a counter-claim may be interposed in an action for a *tort*, provided such counter-claim arises out of the transaction set forth in the complaint as the foundation of plaintiffs' claim, or is connected with the subject of the action. (*We think that this dictum cannot be sustained on authority, but on the contrary the authorities that bear on the question are decidedly adverse to this view.*—REP.)

General Term, February, 1870.

Before BARBOUR, C. J., McCUNN and FREEDMAN, JJ.

APPEAL from an order of the special term sustaining plaintiffs' demurrer to the counter-claim set forth in the answer of the defendant.

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The complaint alleged as a cause of action that on September 28, 1868, the defendant unlawfully and wrongfully took and carried away certain goods, chattels, household furniture, wearing apparel and jewelry, the property of the plaintiffs, of the value of \$4,170, and that he converted and disposed of the same to his own use to plaintiffs' damage, \$5,000. The answer of the defendant contained a series of specific denials, putting in issue every material allegation of the complaint, and also a counter-claim for the recovery of \$350—damages alleged to have been sustained by the defendant in the following manner:

That in pursuance of a certain agreement made between the parties in relation to the hiring of certain premises, a certain chattel mortgage upon the goods and chattels described in the complaint, was duly executed and delivered by the plaintiffs to the defendant; that default was made in the performance of the condition contained in the mortgage; that the defendant thereupon took possession, as he lawfully might, of so much of said property as he could find, but that the plaintiffs had, before the said taking, secreted and removed a part thereof, which could not be found; that it was subsequently discovered that the plaintiffs had no title to a part of the property taken by the defendant, although included in the mortgage, and that the same was replevied and taken from the possession of the defendant by the true owners thereof, whereby the defendant sustained loss to the amount of \$350, for which amount he demanded judgment against the plaintiffs.

The plaintiffs demurred to the counter-claim contained in the answer for insufficiency in not stating facts sufficient to constitute a counter-claim.

The demurrer was sustained at special term, and the defendant appealed.

ELIAS J. BEACH, *for appellant.*

J. C. GRAY & J. A. DAVENPORT, *for respondents.*

Chamboret agt. Cagney.

By the court, FREEDMAN, J.—The facts pleaded and relied upon by the defendant as a counter-claim, constitute a good cause of action in favor of the defendant against the plaintiffs. If greater certainty and definiteness are desired, plaintiffs' remedy is by motion and not by demurrer. The real question, therefore, to be determined is, whether these facts can be pleaded as a counter-claim in *this* action, or whether the defendant is to be driven to a separate action.

The counter-claim is a creation of the Code, and since 1852 includes the defenses of set-off and recoupment as they were understood prior to that time (*Pattison* agt. *Richards*, 22 *Barb.*, 146), but is broader and more comprehensive than either. In *Boston Mills* agt. *Eull* (6 *Abb.*, *N. S.*, 319; *S. C.*, 37 *How.*, 299), I discussed this question fully, citing many authorities, and pointed out the distinction between a set-off, recoupment and the counter-claim introduced by the Code.

The first essential of every counter-claim is, that it shall, of itself, be a distinct cause of action in favor of the defendant pleading it and against the plaintiff in the action, between whom a several judgment might be had as provided by section 274. If it falls short of this, it cannot be treated as a counter-claim within the meaning of the Code (*Vassar* agt. *Livingston*, 13 *N. Y.*, 248), although it may constitute a good defense as a set-off. (*Ferreira* agt. *Depew*, 4 *Abb.*, 131; *Duncan* agt. *Stanton*, 30 *Barb.*, 533; *Spencer* agt. *Babcock*, 22 *Barb.*, 326.) A counter-claim differs from new matter which may be set up in the answer in this: the new matter can only be used to defeat an action; a counter-claim may be used to sustain an action. It is simply a cross action to enforce a legal or equitable set-off against the plaintiff in the action.

There are two species of counter-claims authorized by the Code: one which can be pleaded only in an action arising upon contract, and another which may be set up in *any* action.

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I. In an action arising on contract, the defendant may set up as a counter-claim any other cause of action arising also on contract, express or implied (*Andrews agt. The Artisans' Bank*, 26 N. Y., 301, and *Lignot agt. Redding*, 4 E. D. *Smith*, 285), and existing at the commencement of the action, against a plaintiff between whom and such defendant a several judgment might be had in the action according to the provisions of section 274, and owned by such defendant at the time of the commencement of the action (*Chambers agt. Lewis*, 11 Abb., 210; *Van Valen agt. Lapham*, 13 How., 240), and due at said time (*Rice agt. O'Connor*, 10 Abb., 262; *Code*, § 150, subd. 2).

II. In *any other* action any defendant may set up as a counter-claim against any one of the plaintiffs, between whom and himself a separate judgment might be had in the action as aforesaid (§ 274; *Briggs agt. Briggs*, 20 Barb., 477; *Newell agt. Salmons*, 22 Barb., 647), any claim existing in favor of such defendant against such plaintiff at the time of the commencement of the action (*see Chambers agt. Lewis and Van Valen agt. Lapham, supra*), and of which such defendant is the owner (*Lafarge agt. Kelsey*, 1 Bosw., 171), *provided*, however, such claim is founded upon a cause of action arising out of the contract or transaction set forth in the complaint, or is connected with the subject of the action. (*Code*, § 150, subd. 1.)

Formerly the rule was that in an action for a tort, a counter-claim, no matter whether arising on contract or based upon another tort, cannot be allowed; but this rule, it will be observed, has now been so far modified as to allow the interposition of a counter-claim in the full sense of the Code, whether arising on contract or based upon a tort, in an action for a tort, whenever such counter-claim is founded upon a cause of action arising out of the transaction set forth in the complaint, as the foundation of plaintiffs' claim, or whenever it is connected with the subject of the action. As soon as a defendant does bring himself within one or the

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other of these exceptions made to the general rule, his right to counter-claim is perfect, irrespective of the form of plaintiffs' cause of action as set out in the complaint. This point has been expressly decided by this court, at general term, in *Xenia Bank* agt. *Lee* (2 *Bosw.*, 694; *S. C.*, 7 *Abb.*, 372). See, also, to the same effect, *Brown* agt. *Buckingham* (11 *Abb.*, 387; 21 *How.*, 190).

The authorities relied upon by the plaintiffs in the case at bar do not establish a contrary doctrine. Upon a careful examination and analysis of them I find that every case so cited has been correctly decided, although with different result, for the reason that the defendant had failed to bring himself within at least of one of the exceptions established by the Code as aforesaid. *Pattison* agt. *Richards*, (22 *Barb.*, 143), was an action for a tort; defendant counter-claimed for breach of a contract made four years prior to the commission of the alleged tort and having no connection with the subject of the action.

Donahue agt. *Henry*, (4 *E. D. Smith*, 162), was an action for a tort, and a proposed set-off was held inadmissible because it related to other property than the one forming the subject of the action.

Barhyte agt. *Hughes*, (33 *Barb.*, 320), was an action for an assault and battery. The defendant set up, by way of counter-claim, an assault and battery committed upon him by the plaintiff *prior* to the one described in the complaint. The court very properly held that the two occurrences were so independent of each other that they could not be disposed of in one action.

In *Mayor, &c.* agt. *The Parker Vein Steamship Co.* (21 *How.*, 289; *S. C.*, 12 *Abb.*, 300; 8 *Bosw.*, 300), the action was on *contract* for the payment of rent. The counter-claim was for a wrongful conversion of certain fixtures. It neither arose out of the contract or transaction set forth in the complaint, nor could it be connected with the subject of the action. To obviate this difficulty, the defendants

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made an attempt to sustain it under the second subdivision of section 150, which provides that in an action arising on contract, any other cause of action arising also on contract may be set up as a counter-claim, and argued that they had a right to waive the tort and proceed upon the legal fiction of an implied contract to pay the value. But the court held that this could not be done under the subdivision referred to; that the counter-claim, as pleaded, was simply and purely a claim to recover damages for a tort, upon which, according to the rule laid down by the court appeals in *Walker agt. Bennett*, (16 N. Y., 250), no recovery could be had as upon contract.

The only remaining question, therefore is, whether the defendant has brought himself within the letter and spirit of the first subdivision of section 150 of the Code. I have not been able to find that the precise meaning of the words "subject of the action," as used in that subdivision, has ever been judicially determined. In *Borst agt. Corey*, (15 N. Y., 509), the court of appeals held that the term "subject-matter" of suits, as used in section 49 (*of 2 R. S.*, 301), is synonymous with the term "cause of action" used elsewhere in the same statute. Analogy as well as sound reasoning call for a similar construction of the words "subject of the action." These words must be deemed to mean the subject-matter in dispute, or, to be still more explicit, the facts constituting the cause of action. In the case at bar, plaintiffs brought the action for a trespass upon their property. The object of the action is to recover damages, but the subject thereof is the trespass committed by the defendant. The counter-claim interposed by the defendant is based partly upon plaintiff's fraudulent concealment of property not taken by the defendant, and partly upon the failure of plaintiff's title to property which was taken. But it is not connected with the trespass upon which plaintiffs rely, nor can it be claimed that it arose out of the transaction set forth in the complaint. I concede that section 150

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of the Code was enacted to simplify and expedite the administration of justice; that it is a remedial and beneficial provision, which should, at all times, receive a liberal construction, and from the start I felt strongly inclined to uphold the counter-claim. Subsequent reflection, however, has convinced me that it cannot be done without a great stretch of the meaning of the words "subject of the action" beyond their true and proper significance.

The order appealed from should be affirmed, with costs.

BARBOUR, Ch. J. I concur.

McCUNN, J. I concur.

Hamlin agt. Dingman.

SUPREME COURT.

JOHN W. HAMLIN agt. HENRY DINGMAN.

Law 61
An appointment of a school district collector under the statute, (*Laws 1864, Art. 3, Title 7, Ch., 555, § 32*), made by *parol*, by the trustees of the school district, does not vest the title of office, in the appointee. The appointment should be made in writing as required by the statute, under the hands of the trustees; it is the incumbents commission or warrant; and the statute having designated the mode and manner of making it, it becomes the very essence of the requirement.

A *parol* appointment of the collector, by a sole trustee of the school district, the execution of the bond by the collector, the approval thereof by the trustee, together with the delivery of a tax-warrant to him, constitute him an officer *de facto*, within the meaning of that phrase. And his acts as such *de facto* officer, are binding upon the public and third parties, and the title to his office cannot be inquired into collaterally.

But so far as the officer himself is concerned, the government may try the right to the office by *quo warranto*; and the title to the office may also be questioned where he is a party, and is sued for an act which he can only justify as an officer.

The sole trustee, (defendant) who attempted to create the collector an officer, and to endow him with the rights and functions of office, but disregarded the provisions of the statute as to the mode and manner of executing the power vested in him, stands in no better position. He is in no just sense a stranger to the acts and doings of the collector, and was not ignorant of the defects of his appointment, and knew it was void, and yet sets him in motion with a command to seize and sell the property of others. He is also liable to the plaintiff as a wrong doer.

Erie Special Term, January, 1871.

THIS was an action of trover for the conversion of a yoke of oxen, proved to be the property of the plaintiff.

The defendant was sole trustee of a school district, and as such trustee made out and delivered to one Fowler Munger, a tax warrant against the tax payers of the district, among them the plaintiff, and by virtue of such warrant, the said Fowler, levied upon and sold at public auction, the property in question.

From the bill of exceptions, it appears, that prior to the making of said tax warrant, a vacancy, existed in the office

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of collector for the district—and to fill such vacancy, the defendant by parol and not in writing, appointed the said Fowler Munger, collector, who before receiving such warrant, executed a bond, which the defendant approved. The execution of the bond and the approval thereof by the defendant, was proved by parol, under the plaintiff's objection and exception, that the bond should be produced.

At the close of the proofs, the judge held, that there was no question for the jury, and directed a verdict for the defendant, to which the plaintiff excepted.

CORLETT and TABOR, *for plaintiff.*

STEPHEN LOCKWOOD, *for defendant.*

BARKER, J.—The plaintiff seeks to maintain an action of tort against the defendant. In support of his position he claims that the appointment of Munger, as collector, by the defendant, was not in form or substance a compliance with the provisions of the statute, and therefore, void; that at most, Munger was only an officer *de facto*.

That the action being prosecuted by the plaintiff, to test the validity of the act of seizing his property, the defendant, from whom Munger received his appointment, must establish that he was an officer *de jure*. That the defendant is in no better position to defend than Munger would be, had the plaintiff chosen to prosecute him.

It is provided by section 32, article 3, title 7, chapter 555, laws of 1864, that any vacancy in the office of collector may be supplied by appointment under the hands of the trustees of the district, and the appointee shall hold his office until the next annual meeting of the district.

By section 33 it is provided "Every appointment to fill a vacancy shall be forthwith filled by the * * * trustee making it in the office of the district clerk, who shall immediately give notice of the appointment to the person appointed."

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Every person chosen or appointed to a school district office, who, being duly qualified to fill the same, shall refuse to serve therein, shall forfeit five dollars. (*See sec. 34.*)

The precise question presented is, can an appointee under this statute be vested with the title of office, to which he is appointed, unless the appointment be in writing under the hand of the trustee.

The language of the statute is plain, that the appointment must be in writing, and the fact that the appointment is required to be filed with the clerk, is further evidence of the intention of the legislature.

Considering the object in view, the creation of a public officer, the statute cannot be construed to be only directory. The appointment in writing is the incumbent's commission or warrant. The fact of his appointment cannot be proved by parol, as satisfactorily as in writing—for the reason the evidence of the act would be uncertain and remain doubtful. The death of the trustee might destroy all evidence of the appointment. The exercise of this power to create a public officer must be by some public act. In the case before us the statute has designated the mode and manner, and it is the very essence of the requirement.

The filing of the appointment with the clerk, and other things required to be done subsequent to the appointment, are doubtless formal in their nature, and a deviation from the requirements of the statute would not impair the appointment, so far as third persons are concerned.

If the interpretation I have given to the statute be correct, then Munger was not an officer *de jure*.

The parol appointment, the execution of the bond, the approval thereof by the trustee, together with the delivery of the tax warrant, constituted him an officer *de facto*, within the meaning of that phrase. His acts as such *de facto* officer, are binding upon the public and third parties, and the title to his office cannot be inquired into collaterally.

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But so far as the officer himself is concerned, the government may try the right to the office by *quo warranto*, and the title to the office may also be questioned where he is a party, and is sued for an act which he can only justify as an officer. (*Fowler agt. Beebe*, 9 Mass., 231; *Coolidge agt. Brigham*, 1 Allen, 333.)

In the latter case, the court after suggesting that the magistrate who issued the process, upon which the action was based, was only an officer *de facto*, remarks: "If this action had been against the magistrate, and he had attempted to justify his acts under and by virtue of his commission as a justice of the peace, it might be competent to show that his appointment was invalid, and afforded him no protection."

In *The People agt. Hopson*, (1 Denio, 579,) it is held that an officer *de facto* cannot recover fees or justify his own acts, unless he also shows that he is an officer *de jure*. That "when one man attempts to exercise dominion over the person or property of another, it becomes him to see that he has unquestionable title." In *Riddle agt. Bedford*, (7 Serg. & Rawle, 386,) the court held the true distinction to be this, in cases where the acts of a *de facto* officer are questioned; that the office is *void* as to the officer himself, but valid as to strangers. (See also *Green agt. Burke*, 23 Wend., 503).

If, then, Munger had been sued, and charged as a trespasser, for this act of his, seizing and selling the plaintiff's oxen, he could not have justified, for the reason he had no legal title to the office.

The defendant, who attempted to create Munger an officer and to endow him with the rights and functions of office, but disregarded the provisions of the statute as to the mode and manner of executing the power vested in him, stands in no better position. He is in no just sense a stranger to the acts and doings of Munger, and was not ignorant of the defects of his appointment and knew it was void, and yet

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sets him in motion with a command to seize and sell the property of others. He is also liable to the plaintiff as a wrong doer. (*Cummings agt. Clark*, 15 *Vt.*, 163.)

For the purpose of showing that Munger was an officer *de facto*, it was competent to prove, by parol, that he had executed a bond, and the same was approved by the trustee. The contents of the bond nor the form of approval, were attempted to be proved.

If, upon another trial, it shall appear from the bond, that it contains a full recital that the defendant, as trustee, had appointed him to the office of district collector, and under or upon such bond he has indorsed a written approval, an interesting question will arise—whether it will not be a substantial compliance with the provisions of the statute, and amount to an appointment under the hand of the trustee.

In this action, where the plaintiff charges the defendant as a wrongdoer, he cannot prove that the school district record, wherein it appears that the tax levied by the defendant was voted, is false and erroneous. In appropriate proceedings he can correct the record, and cause the tax assessed to be set aside.

A new trial is granted, with costs to abide the event.

Beattie agt. Niagara Savings Bank.

SUPREME COURT.

BEATTIE agt. NIAGARA SAVINGS BANK.

It rests exclusively in the discretion of the judge holding the circuit, whether *exceptions* taken in a cause tried before him shall be heard in the first instance at the general term, or at the special term.

It is quite certain that no *appeal* would lie from such an order; and it seems that its reversal cannot be accomplished by a motion at special term to vacate it.

Where the exceptions taken on the trial were, at the close of the trial, ordered by the judge to be heard in the first instance at the general term, and the exceptions were argued before the general term, but that court finding itself unable to grant the defendant relief, and that it could only be done by the special term, omitted to decide the case and held it under advisement; and in the mean time a motion was made by the defendant at special term for an order vacating the order of the circuit judge directing the exceptions to be heard at the first instance at general term, which was granted:

Held, on appeal from this last order, that it be vacated, without costs, as the question was a new one.

The practice of sending these cases to the general term, unnecessarily increases the business of that court, and such an order should not be made unless in cases of the highest importance, or of absolute necessity.

Fourth Judicial Department, General Term, September, 1870.

APPEAL from an order of special term.

Mr. BRAZEE, for plaintiff.

Mr. BOWEN, for defendant.

By the court, MULLIN, P. J.—This cause was tried at the circuit and a verdict rendered in favor of the plaintiff.

The court at the close of the trial, ordered that the exceptions taken on the trial be heard in the first instance at the general term.

In pursuance of this order, the exceptions were argued before the general term, but that court finding itself unable

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to grant the defendant relief, and that it could only be done by the special term omitted to decide the case, and holds it still under advisement.

In the mean time a motion was made by the defendant before Judge TALCOTT, while holding the circuit in Niagara county where the cause was tried, for an order vacating the order directing the exceptions to be heard in the first instance at the general term, and an order was made vacating such order, and from that order the plaintiff appeals.

It rests exclusively in the discretion of the judge holding the circuit, whether exceptions taken in a cause tried before him, shall be heard in the first instance in the general term or at the special term.

He is familiar with the pleadings, the evidence and the questions of law decided on the trial, and no other judge can be as capable of determining whether the questions to be presented on a motion for a new trial are of sufficient difficulty and importance to require their submission in the first instance, to the consideration of the general term.

It is quite certain that no appeal would lie from such an order. And it seems to me its reversal cannot be accomplished by a motion to vacate such an order. Where the circuit has terminated, even the judge who made the order, cannot vacate it.

The necessity for vacating the order arises from the view taken by the general term of the effect upon it of the order at the circuit.

That court was of the opinion that to dispose of the questions arising on the motion for a new trial, a court that had greater latitude than the general term in the examination of the facts, should hear and determine the case, and that the case could not be remitted to the special term, so long as the order made at the circuit was in force.

The provision of the Code (§ 265), is a motion for a new trial on a case or exceptions, or otherwise must, in the first instance, be heard and decided at the circuit or special term,

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except that where exceptions are taken, the judge trying the cause, may at the trial direct them to be heard in the first instance at the general term, and the judgment, in the meantime, suspended, and in that case they must be heard in the first instance, in the general term, and judgment there given.

Were it not for the last clause of the section, I should be of opinion that the general term, upon finding it could not determine the case, might send it back to the special term, the—hearing so far as to enable it to ascertain its want of ability to afford relief, being a compliance with the order at the circuit. But as judgment must be entered in the general term, it would be idle to send the case to the special term, as that court could not change the case as set out in the bill of exceptions.

It seems to me, therefore, that the defendant is remediless, unless the general term shall grant him a new trial.

These orders sending exceptions to be heard first at the general term, are generally made upon the suggestion of the party against whom the verdict is rendered, and not unfrequently when the special term could dispose of the questions, as well, if not better, than the general term.

The practice of sending these cases to the general term unnecessarily increases the business of that court, and such an order should not be made, unless in cases of the highest importance or of absolute necessity.

The order should be vacated, but without costs, as the question is a new one.

Judge TALCOTT having heard the motion, does not sit on hearing the appeal.

McClave agt. Paine.

N. Y. SUPERIOR COURT.

JOHN MCCLAVE, plaintiff and appellant, agt. WILLIAM H. PAINE, defendant and respondent.

To entitle a real estate broker to recover the usual commission, it must appear that his agency was, *in point of fact*, the procuring cause of the sale. Whether his agency did or did not have such effect, is a question of *fact*, to be determined upon the particular circumstances of each case.

After a defendant has introduced evidence to the effect that the purchaser's information was not derived from the broker, the latter is not entitled to have the jury instructed, substantially, that they might find a verdict in his favor solely upon proof of a bare introduction of the purchaser to the defendant. In such case the jury must further find upon the evidence that the broker, either by the introduction itself, or in some other manner, called or caused to be called, the attention of the purchaser to the property in question.

General Term, March, 1870.

Before MONELL, McCUNN and FREEDMAN, JJ.

APPEAL from a judgment entered upon the verdict of a jury.

The action was brought for the recovery of the usual broker's commission for an alleged sale of certain real estate.

The answer, in effect, amounted to a general denial of all the allegations contained in the complaint.

Upon the trial it appeared in evidence, that in October, 1867, the defendant placed in the hands of the plaintiff, a real estate broker, five distinct pieces of property for sale on commission, among which were half a block on the north side of 91st Street, between Eleventh and Twelfth Avenues, and two blocks between 66th and 67th Streets, Tenth Avenue and the Hudson River. That plaintiff sold the 91st Street property to William T. Blodgett, and received from the defendant his commission therefor.

That subsequently the property on 66th and 67th Streets

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was sold by the defendant to William T. Blodgett, for \$200,000; that plaintiff, upon hearing of said sale, demanded a commission of one per cent. on that amount, which defendant declined to pay.

Plaintiff introduced evidence to the effect that he had a particular interview with Blodgett in regard to the 91st Street property, at which he told Blodgett that defendant had other pieces of property, without specifically naming them, however; that he requested Blodgett to call upon the defendant, and to purchase whatever piece might suit him; that he gave defendant's address to Blodgett, and that he sent a diagram of the property situate on 66th and 67th Streets to Blodgett's house, together with a diagram relating to the 91st Street property.

William T. Blodgett, called as a witness on behalf of the defendant, testified that he never received plaintiff's diagram relating to the property on 66 and 67th streets; that his attention was not called to it by the plaintiff, nor to the fact of its being defendant's property, and for sale; that he first became aware of these facts from defendant himself after the purchase of the 91st street property; that the negotiations for the purchase of the property on 66th street and 67th streets were conducted entirely between himself and defendant; that at the time plaintiff showed him a map of the 91st street property, plaintiff spoke also of some lots on Seventh avenue, but did not mention any other, and that plaintiff never used the expression to him that defendant had other property for sale, &c.

The jury, under the charge of the court, found a verdict for the defendant.

Judgment was entered thereon for the defendant, and plaintiff appealed.

ALBERT STICKNEY, *counsel for plaintiff and appellant.*

HENRY H. ANDERSON, *counsel for defendant and respondent.*

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By the court, FREEDMAN, J.—The appeal being from the judgment, no question of fact can be considered, nor the point that the verdict of the jury is against the weight of evidence. The only questions open for review are questions of law. They all arise upon or in connection with the charge of the learned judge presiding at the trial, and his refusal to charge certain requests made by plaintiff. Unless he erred in the application of the law, the judgment appealed from must be affirmed. There was a conflict of evidence as to whether the plaintiff did or did not, prior to the sale by the defendant, call the attention of the purchaser to the property for the sale of which plaintiff seeks to recover a commission. The purchaser most emphatically denied it. From the whole charge of the court, it clearly appears that the question was fairly submitted to the jury. They found the fact in favor of the defendant, and this finding cannot be disturbed. The real and only question involved in the appeal, concisely and tersely stated, is whether the plaintiff was entitled, as the evidence stood, to have the jury charged, that if they found that, although the purchaser was first introduced by plaintiff to defendant for a different purpose, which was accomplished, the acquaintance thus brought about between the parties led ultimately, without further intervention of the plaintiff, to the sale of the property in question, the plaintiff was entitled to recover.

Inasmuch as the fact of such original introduction was admitted, this proposition, if charged, would have been equivalent to a direction to find a verdict for the plaintiff. In my judgment, it would have been error so to charge. It is now the settled law of this state, that in case of a general employment of a broker, where his title to commissions is not made expressly to depend upon his securing a purchaser on terms, which are specified, the only conditions precedent to the broker's right to recover are the original discovery of the purchaser, the starting of

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the negotiations by the broker, and his bringing the minds of the vendor and vendee to an agreement. When he has done that, when he has produced a purchaser, willing and ready to accept the terms of the owner, and able to perform the obligation on his part, he has earned his commissions. He can do no more. He has no power to execute a contract, to pay the money for the one side, to convey the land on the part of the other, or to compel the performance by either of their duties. To be enabled to maintain his action for his compensation, it is, therefore, not necessary that the agreement for the sale of the property should have been reduced to writing and signed by the parties. And it is further settled, that after the broker has thus discovered the purchaser, and started negotiations between him and the owner, the latter cannot avail himself of the services of the broker so far rendered, and then, by taking the negotiations into his own hands, effect a sale, either at the price suggested to the broker, or at a reduced price, and refuse payment of commissions. Nor can the owner, in a case of this description, deprive the broker of his commissions by revoking the broker's authority to complete the transaction. (*Stillman* agt. *Mitchell*, 2 *Robt.*, 523; *affirmed*, 36 *N. Y.*, 237; *Barnard* agt. *Monnot*, 3 *Keyes*, 203, *S. C.*, 33 *How.*, 440.) Thus, where a broker employed to make a sale, under an agreement for the exclusion of all other agencies, produced a party ready to make the purchase at a satisfactory price, it was decided that the principal can neither relieve himself from liability by a capricious refusal to consummate the sale, nor by a voluntary act of his own, which disables him from performance. (*Moses* agt. *Bierling*, 31 *N. Y.*, 462.) And in another case, recently decided by the court of appeals, it was held that a real estate broker is entitled to the usual commission for a successful negotiation of the exchange of property put in his hands for sale, when the exchange has been effected through his aid and

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the terms of the exchange has been accepted by his employer. (*Redfield agt. Tegg*, 38 N. Y., 212.)

But although courts have thus, at all times, protected a broker against any unfairness or fraud on the part of the owner, no case can be found in which the *bare* fact of an introduction by a broker authorized to sell has, in case of a subsequent sale, been held sufficient, *per se*, to entitle the broker to his commissions. I concede that if a broker, employed to sell certain property, sends a party contemplating to buy to the owner, *with reference to that property*, and the introduction ultimately results in a sale, he is entitled to his commissions, although he did not describe the property to the purchaser. But the case is entirely different if a broker, intrusted by the same owner with the sale of three or more distinct pieces of property, calls the attention of a party contemplating to buy, to only two of them, and prevails upon him to see the owner with reference to the purchase of the one or the other, which is done. Suppose the broker intentionally omitted to mention the other pieces? He might have, or fancy that he could procure, another and more desirable party for them, and designedly withhold the information in regard to them. Upon what principle, then, could he claim commissions for a sale which took place contrary to his wishes, intentions and calculations? An owner does not preclude himself, by employing a broker, from making personal efforts to sell. He has a right to make them, and if they result in a sale the broker cannot find fault, unless some right previously acquired by him is violated thereby. If they amount to such violation, the courts will interfere. Thus an owner may sometimes make himself liable to the payment of double commissions if he makes an express but different contract with two brokers separately, and each of them fully performs what he has undertaken to do; but, on the other hand, where an owner agrees with two brokers, separately, to pay a commission, but only one commission, to *the* broker effecting the sale,

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and a sale results therefrom, only one of the brokers can be entitled to it. So, where a party contemplating to buy, has a prior knowledge of the facts communicated to him by the broker, and acts solely upon such prior knowledge, and entirely uninfluenced by anything the broker has said or done, the broker does not earn a commission.

The true rule, which has been applied in every case to be found in the books, is, that to entitle a broker to recover it must appear that his agency was, in point of fact, the procuring cause of the sale. (*Briggs agt. Rowe*, 4 *Keyes*, 424. Whether his agency had or had not such effect, is a question of fact to be determined upon the particular circumstances of each case. Proof on the part of the plaintiff that he sent the person, who subsequently became the purchaser, to the owner, may sometimes be deemed sufficient to establish this fact *prima facie*, but after the defendant has introduced evidence to the effect that the purchaser's information was not derived from the broker, the latter cannot rest his entire case exclusively upon a bare introduction. He must go further, and show, at least, that he called, or caused to be called, the attention of the purchaser to the property in question. Plaintiff's exceptions, therefore, are not well taken. The judgment appealed from should be affirmed, with costs.

MONELL, J.—I concur.

MCCUNN, J.—I concur.

Lund agt. Broadhead.

SUPREME COURT.

PETER LUND agt. WILLIAM BROADHEAD and another.

If in fact the sum total of the *accounts* of the parties exceeds \$400, it is not necessary that the action be first brought in a justice's court, and that the amount of the accounts should be there shown *by proof* to exceed \$400. The jurisdiction of the justice's court may be shown by the pleadings.

Where the complaint alleged, substantially, that the plaintiff rendered labor and services to the defendants at agreed prices to the sum of \$450, and then admitted or alleged that the defendants have a *counter-claim* or *set-off* to the plaintiff's account of \$409 13, leaving an amount due the plaintiff of \$40 87, which has not been paid.

And the defendants in their answer admit all the material allegations in the complaint, except that they deny that they ever refused the plaintiff an accounting and settlement of the accounts, and allege that the plaintiff and defendants have had an accounting and settlement thereof, and that the balance as stated in the plaintiff's complaint, is still unpaid.

And the referee, to whom the cause was submitted upon the pleadings—no other evidence being given, found that the account of the plaintiff exceeded the account of the defendants by the sum of \$40 87, and directed judgment for plaintiff accordingly; *held*, that the *plaintiff was entitled to costs*.

The defendants, to avoid liability for costs, should have answered that they had *paid* the sums on account of the plaintiff's work, and not admitted that they had an account by way of *set-off* or *counter-claim*.

Payments extinguish the claim or demand of the creditor *pro tanto*.

Erie Special Term, March, 1871.

MOTION for re-adjustment of costs

The plaintiff in the summons claims judgment for \$40 87, and in his complaint alleges that from September 1st, 1869, to May 1st, 1870, he, at the request of the defendants, rendered labor and services in making clothing of different kinds at an agreed price for each article, amounting in all to the sum of \$450 00, that the plaintiff admits that the defendants have a counter-claim or set-off to the plaintiff's account amounting to \$409 13, leaving an amount due the plaintiff from the defendants of \$40 87, which has not been paid

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or any part thereof; that he has demanded an accounting and settlement of said accounts and payment, which defendants have refused.

The defendants, in their answer, admit all the material allegations in the complaint, except that they deny that they ever refused the plaintiff an accounting and settlement of the accounts and allege that the plaintiff and the defendants have had an accounting and settlement of said accounts, and that the balance as stated in the plaintiff's complaint, is still unpaid. The defendants answer new matter, which was put in issue in reference to which no evidence was given on the trial.

The case was submitted to the referee upon the pleadings, no other evidence being given.

The referee found that the plaintiff labored for the defendants, in making articles of clothing, at a stated and agreed price for each and every article so made. That the total price for the articles so manufactured, amounted to the sum of \$450 00; that the defendants have a counter-claim or set-off to the plaintiff's claim, amounting to the sum of \$409 13, that the account of the plaintiff exceeds the account of the defendants by the sum of \$40 87, and as matter of law, he directed judgment for that sum in favor of the plaintiff. The county clerk adjusted costs in favor of the plaintiff. The defendants moved for a re-adjustment of costs in their favor.

WESLEY MARTIN and H. O. LARKIN, *for plaintiff.*

B. A. BARLOW, *for defendants.*

MARVIN, J.—The plaintiff is entitled to costs unless a justice of the peace would have had jurisdiction. (*Code, Sec. 304, Subd. 3.*) By section 54, a justice of the peace has no cognizance of a matter of account where the sum total of the account of both parties, proved to the satisfaction of the justice, shall exceed \$400.

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If in fact, the sum total of the accounts of the parties does exceed \$400, it is not necessary that the action be first brought in a justice's court, and that the amount of the accounts should be there shown by proof to exceed \$400. (3 Abb. 365.)

The defendants' counsel insists that the account of the plaintiff for work had been reduced by *payments* so that the sum owing to him was \$40 87, and that that so appears from the plaintiff's complaint. If this construction of the complaint is correct, then the sum total of the accounts did not exceed \$400, it would be but \$40 87.

Payments extinguish the claim or demand of the creditor *pro tanto*.

But should the complaint be so construed? Stated shortly, the allegations of the complaint are that the plaintiff rendered labor and services to the defendants, at agreed prices to the sum of \$450. It is then admitted (say alleged) by the plaintiffs, that the defendants have a *counter-claim* or *set-off*, to the plaintiff's account of \$409 13, leaving an amount due the plaintiff of \$40 87, which has not been paid.

I do not think, we should be justified in saying that the complaint shows that any part of the plaintiff's account or demand had been paid, or that there had been any settlement between the parties, or that any balance had ever been struck. Indeed, the plaintiff proceeds to say that he had demanded an accounting and settlement which had been refused by the defendants, as appears from the complaint, the plaintiff's account for work and services was \$450, and the counter-claim or set-off of the defendants was \$409 13.

These being the facts, a justice of the peace would have no jurisdiction.

If the complaint had shown that the parties had settled the accounts and struck a balance, then the action could have been maintained in a justice's court, or if the complaint had shown that the defendants had from time to time

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made *payments*, thus extinguishing the account *pro tanto*, then the action for the amount unpaid could have been tried in justice's court. I do not think, that on the motion for re-adjustment of costs, that I can consider the affidavits produced showing the course of dealing between the parties. The counsel cites *Crim agt. Cronkhite*, (15 *How.*, 250), as a case where affidavits were made, but it appears in that case that the facts stated in the affidavits were proved on the trial. In this case there was no testimony other than the pleadings.

In the case just cited, the referee found the amount of the defendant's account against the plaintiff, by way of "*payment* and counter-claim." It appears that a certain sum was *paid* in money *towards the plaintiff's labor*, and deducting this sum, the accounts were reduced below \$400.

The counsel for defendants cites *Hoodless agt. Brundage*, (8 *How.*, 263). The action was upon a note upon which payments had been made.

The plaintiff in his complaint, admitted that a certain other sum or account should be allowed, and he claimed judgment for \$95 85. The defendant denied the complaint, and claimed a much larger account in his favor than that admitted in the complaint. The recovery was \$5 20. The defendant proved his account amounting with interest to \$253 48, and this was the only matter in dispute, and with the claim of the plaintiff, the judge says, was not sufficient to deprive the justice of jurisdiction. Justice HARRIS cites (10 *Wend.*, 556, and *note*), a case where the accounts exhibited on the trial exceeded \$400, but the evidence shows specific payments which were not an account valid as a set-off. The case in the note, (10 *Wend.*, 557,) was a case of *payment* and not set-off, and the court held that, though the claim established on the trial exceeded \$200, (this was under the Revised Statutes,) and that it being reduced by *payment* below \$50, the plaintiff could not have costs, but if it had been reduced by set-off, then he would be

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entitled to costs. I have looked into *Glaskin* agt. *Green*, (52 *Barb.*) cited by counsel, and some other cases. There is no conflict in these cases. In this case, the counsel puts the construction upon the complaint as admitting payments on his account, reducing it below \$50.

The admission is that the defendants have a *counter-claim* or *set-off*, and the plaintiff asked judgment for the balance. Suppose, the defendants had denied the complaint and had not plead a counter-claim or set-off, what would have been the condition of the plaintiff? If the demands of the defendants were counter-claim or set-off, the plaintiff had no power to apply them in the reduction of his account. If the defendants refused to plead and prove their counter-claim or set-off, they could have sued and recovered the whole amount, and if the plaintiff had contented himself with a judgment for the balance, he might be subjected to great loss.

He, however, stated the facts showing that a justice had no jurisdiction, and the defendants admitted the facts, and the judgment has been justly rendered for the balance.

If the defendants intended to make the question now raised, they should have answered that they had *paid* the sums on account of the plaintiff's work, and not admitted that they had an account by way of counter-claim or set-off.

I think, the costs have been properly adjusted against the defendants, and the motion must be denied.

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N. Y. SUPERIOR COURT.

DELIA DICKSON, respondent, agt. THE BROADWAY AND
SEVENTH AVENUE RAILROAD Co., appellants

Where the plaintiff brought her action against the defendants—a city railroad company—for damages alleged to have been caused by serious injuries received by her, through the negligence and carelessness of the defendants' servants, in starting the car on a return trip before she could get off, by reason whereof she was thrown upon the paved street—her leg broken and other injuries received.

Held, by the general term on appeal by the defendants, that the evidence given upon the trial was sufficient, not only to establish the fact that the plaintiff was not thrown from the car by the starting of the horses, but that she must have jumped, or stepped off, of her own volition, after the car was in motion.

The plaintiff having failed to prove upon the trial that the injuries of which she complained, were caused by the starting of the horses, the judgment rendered in her favor was reversed and a new trial ordered, costs to abide event.

General Term, December, 1870.

Before BARBOUR, C. J., McCUNN and JONES, JJ.

IN April, 1869, the plaintiff left her home to go to the Central Park. She got on to one of the defendants' cars and asked the conductor if he would take her to the Central Park, and he told her that he would leave her at the Park.

When the car arrived at the block between 52d and 53d street, the car stopped, and the only other passenger, besides the plaintiff, got off. Not having arrived at the Central Park, the plaintiff kept her seat, until she suddenly discovered the horses being hitched on the other end of the car.

She then got up to leave. Just as she reached the door of the car and was about going out, the car suddenly started, and she was thrown off and seriously injured.

Her leg was broken, anchylosis of the ankle was produced. She was laid up, and under the daily care of a physician for a period of four months. She received an in-

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jury from which she can never recover. She was still lame from it at the time of the trial.

The case was tried before Mr. Justice MONELL and a jury. The jury found a verdict for the plaintiff for \$3,000. The defendants made a motion for a new trial, which was denied, and judgment was entered on the verdict, from which this appeal is taken.

The defendants' statement did not materially differ from the plaintiff's, except that it claimed to have established at the trial, that all the passengers had alighted and were safely landed before the car started, and that plaintiff received the injury complained of by a mis-step in passing from the car to the sidewalk, over the rough and uneven pavement.

JOHN M. SCRIBNER, Jr., *for appellant.*

I. Plaintiff was required to prove *affirmatively*, and by *preponderance* of evidence, that the accident which caused her injury was occasioned *solely* by defendants' negligence. A mere "balanced case" is not enough. The burden of proof is upon her, and she must satisfy the court *by the greater weight of testimony* that, without any carelessness or blame on her part, she has suffered an injury wholly through the neglect or wrongful act of the defendants. (*Ernst agt. Hudson R. R.R. Co.*, 24 *How.*, cited from p. 103.) The legal propositions established by this case were distinctly approved, when the same case was a third time before the court of appeals. (39 *N. Y.*, 66.) "The judge will not be justified in leaving the case to the jury, where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant." (*Cotton agt. Wood*, 98 *Eng. Com. Law.*, 566.) It is unnecessary to multiply authorities in support of such familiar principles.

II. The plaintiff failed to establish a cause of action against the defendants. That she was injured at the time

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referred to, is not disputed; but she failed to prove—unless her own evidence, alone, is allowed to outweigh the testimony of all the other witnesses in the case—that her injury was attributable to any degree of negligence on the part of the defendants. She was, in fact, the only witness on her own behalf as to the circumstances of the accident; because her witness, the policeman, was proved to have stated on the same day, that he did not see the accident; and Ketchell testified distinctly that he did not see plaintiff before she fell, but that the first time he saw her she was in the middle of the street. He made this statement several times with great positiveness in response to plain and direct questions, repeated in unmistakeable language by plaintiff's own counsel; and the court must certainly disregard his subsequent testimony, when he attempts to *unswear* the statements so distinctly and deliberately made on his first examination.

As against the evidence of the plaintiff, the defendants proved that when the car stopped all the passengers were safely landed, and when it started on its return trip there was no person in or about the car except the driver and conductor.

That the plaintiff, when she was picked up, lay fifteen or twenty feet from the railroad track, was proved without contradiction; which, of itself, is evidence that she could not have received her injury in the manner she states.

Defendants proved, also, the undeniable fact that, at the place of the accident, the pavement of the carriage-way was exceedingly rough, being paved with large cobble stones of unequal sizes, with ruts and indentations so that Vosburgh says he used to avoid it and take Broadway; and the doctors, who were sworn as witnesses, agreed that the plaintiff's injuries could have been sustained by her in walking from the car to the sidewalk over such a pavement. Waterman, a disinterested witness, testified that plaintiff did meet with her misfortune in this way. "She took a step,

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stumbled and fell." He was within fifty feet from the plaintiff, and he cannot be mistaken. He says he first saw her on the street, between the track and the gutter, ten feet from the rail. "She was falling when I first saw her. The car had just then started on its way down town. It was going very slow when I first saw the lady." He corroborates the driver and conductor; and Vosburgh adds, that the conductor was on the back platform, where he must certainly have seen the plaintiff if she was thrown from the car.

Upon this evidence defendants were entitled to a nonsuit, and the court erred in refusing to dismiss the complaint. (*Johnson* agt. *Hudson River Railroad Co.*, 20 N. Y., 73; *Wilds' Case*, 24 N. Y., 430; *S. C.*, 29 N. Y., 315; *Sheldon* agt. *Hudson River Railroad Co.*, 29 Barb., 229; *Suydam* agt. *Grand Street Railroad Co.*, 41 Barb., 380; *Ernst* agt. *Hudson River Railroad Co.*, 39 N. Y., 61.)

Wilds' Case (24 N. Y., 430), is constantly cited in the court of appeals, and the legal doctrines pronounced in that case have never been shaken. (*Grippen* agt. *N. Y. Central Railroad Co.*, 40 N. Y., 52.)

Although the law allows parties to be witnesses on their own behalf, their testimony is to be examined with greater scrutiny than that of disinterested witnesses. (*Watkins* agt. *Cousall*, 1 E. D. *Smith*, 66.)

III. Ample time was afforded to the plaintiff to get off, and if her statement of the circumstances of the accident is to govern, even then she is not entitled to recover. She says she was the only passenger in the car when it stopped. Her exit was not obstructed, and she could certainly have safely alighted in the time necessarily occupied by the driver in reversing his team. All the authorities agree that the plaintiff must be held to the exercise of ordinary care, and if, by the exercise of her ordinary faculties, she could have seen and avoided the danger, she cannot maintain this action.

IV. This verdict was against the clear weight of evi-

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dence, and the power and duty of the court to reverse a judgment founded upon such a verdict is determined in the following, among other cases: (*Sheldon* agt. *Hudson River Railroad Co.*, 29 *Barb.*, 226; *Thompson* agt. *Menck*, 22 *How.*, 431; *Heritage* agt. *Hall*, 33 *Barb.*, 347; *Wilds* agt. *Hudson River Railroad Co.*, 24 *N. Y.*, 430; *Macy* agt. *Wheeler*, 30 *N. Y.*, 231; *Haring* agt. *N. Y. and Erie Railroad Co.*, 13 *Barb.*, 15, cited 41 *Barb.*, 380; *Mackey* agt. *N. Y. Central Railroad Co.*, 27 *Barb.*, 541.)

V. The court erred in allowing the questions put to the witness Ketchell. A reference to the previous testimony of this witness will show that the same questions were put to him on his first examination and explicitly answered, and it was improper after the plaintiff had rested, to allow him, with no request by himself, but in answer to leading questions, to deliberately retract his previous testimony, which did not conflict with, but materially corroborated defendants' witnesses. The testimony shows that the intimation that there was any mistake, came from the counsel and not from the witness.

VI. The court erred in refusing to charge defendants' third request. (*Ernst Case*, 24 *How.*, 97; *S. C.*, 39 *N. Y.*, 61, *Justice CLERKE's Opinion.*)

VII. The court erred in refusing to charge defendants' fourth request.

VIII. The court erred in refusing to charge the jury in the words of defendants' seventh request.

IX. The court erred in refusing to charge as requested in defendants' twelfth request.

The testimony of the witness Waterman, if believed, constituted a perfect defense to the plaintiff's cause of action, and the jury should have been so instructed.

X. The verdict was excessive. The jury, no doubt, have included in their verdict compensation for the broken ribs (not sued for and never heard of until the trial), doctor's and druggist's bill, nurse's wages all together, for

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although on defendants' motion testimony as to these items was stricken out of the record, it was not expunged from the minds of the jury as the amount of the verdict shows. Upon her complaint plaintiff could only recover for her broken leg. Another suit is pending by her husband for loss of service and expenses. If the court does not wholly reverse the judgment, the verdict should be reduced. (*Collins* agt. *Albany and Schen. Railroad Co.*, 12 *Barb.* 492; *Clapp* agt. *Hudson River Railroad Co.*, 19 *Barb.*, 462.)

XI. The judgment should be reversed and a new trial ordered, with costs to abide event.

IRA D. WARREN, *for respondent.*

I. The first exception which seems worthy of attention at all, is the third request to charge, in which the court was requested to charge that "the plaintiff must make out more than a balanced case by a preponderance of reliable evidence."

This proposition was in substance submitted to the jury. The plaintiff had four witnesses to two. There was nothing to show that their evidence was not perfectly reliable.

Such a general proposition applicable to no testimony in the case, the defendant cannot claim to have charged in *his* language where it is in substance left to the jury, his honor, however, charged it stronger than requested, for he told the jury "if they believed the conductor and driver, they must find a verdict for the defendants." (*Downs* agt. *Sprague*, 2 *Keyes*, 57.)

The judge has or ought to have a right to choose his own language on the general propositions of a case.

The fourth request requires no comment. The seventh request is a hypothetical proposition. There is no evidence in the case to justify any such charge. (*Havens* agt. *Erie R. R. Co.*, 53 *Barb.*, 328; *Rouse* agt. *Lewis*, 2 *Keys*, 352.)

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It is error for a judge to instruct the jury that if they believe the testimony of one witness (where there are other witness on the same subject,) they must find a verdict for the plaintiff or defendant. (*Clements* agt. *McConnell*, 14 Ill., 154.)

II. The defendants' objection to the re-examination of the witness, Mitchell, to the questions put to him are not tenable.

The witness misunderstood the questions put to him. He had sworn that he first saw plaintiff in the middle of the street, when he meant on the platform of the car, which stood in the middle of the street.

The witness's understanding not being of the clearest character, it was entirely permissible to recall him to correct any mistake.

This was, however, entirely within the discretion of his honor the justice who tried the cause, and is not the subject of review. (*Vrooman* agt. *Griffiths*, 1 *Keyes*, 53; *Foster* agt. *Cronkhite*, 35 N. Y., 153.)

He had a perfect right to permit, or refuse permission to recall this witness, it was entirely in his discretion. In this case, it would have been an act of injustice to the witness and plaintiff both, to have refused, as the witness's language did not convey all he meant. He meant to say in the middle of the street on the platform of the car.

III. The defendants claim that the damages are excessive.

The court will see this was a very serious injury. She was under the charge of a physician four months. She can never recover. She suffered from it at the time of the trial, more than a year after the accident.

There is a constant swelling of the limb.

KENT, C. J., in *Coleman* agt. *Southwick*, (9 *Johns.*, 45,) lays down the rule, that to justify the court in granting a new trial for excessive damages, that they should be so excessive "as to strike all mankind at first blush, as beyond all measure unreasonable and outrageous, and such as mani-

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festly show the jury to have been actuated by passion, partiality, corruption or prejudice."

There is nothing in this case coming within that rule.

In the case of *Clapp* agt. *H. R. R. Co.*, a verdict for \$4,500, was sustained where the injury was not more than this.

In *Drew* agt. *Sixth Avenue R. R. Co.*, (26 N. Y., 52,) a verdict for \$2,500 was sustained for loss of services of a boy eight years old. The court of appeals say that the damages was wholly for the jury to determine.

Cases of larger verdict for injuries no greater, might be multiplied, if it was necessary. (*Ingersoll* agt. *Miller*, 47 *Barb.*, 47.)

Where a case is submitted to a jury under so able and careful a charge from the court as this, where the injury is a permanent one, where the plaintiff was confined to her house for four months, this court will hardly feel justified in setting aside a verdict for \$3,000 until some more accurate method is arrived at for measuring the pecuniary price of human suffering than the judgment of twelve men taken from the ordinary pursuits of life. Certainly the court is not better qualified to judge of that than the jury. We have had the unanimous judgment of twelve. The defendants now ask that the judgment of three pronounce the judgment of twelve erroneous.

As long as bodily pain and suffering are subjects of compensation in actions of this kind, as is now the settled law of this state (*Ransom* agt. *N. Y. and Erie Railroad Co.*, 15 N. Y., 417), just so long a jury, and not the court, should estimate its amount. (*Redfield on Railways*, Vol. 2, 221, *subd.* 6.)

IV. There is a conflict of evidence on every question in this case.

It is hardly necessary to discuss the proposition now, that where there is such conflict of evidence, the court will not set aside the verdict. (*Hooglan* agt. *Wright*, 7

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Bosw., 394; *Tinson* agt. *Welch*, 7 *Robt.*, 394, and cases cited; *Polhemus* agt. *Moser*, 7 *Robt.*, 489; *Morris* agt. *Second Avenue Railroad Co.*, 8 *Bosw.*, 681.)

We have four witnesses against two on the question of negligence. On the question of injury, Dr. Randolph on one side, and Dr. Ranny, who never saw the injury, on the side of the defendant.

There does not seem to be anything in this case to require discussion, either on the exception or evidence.

V. We ask that the judgment be affirmed, with costs.

This action was brought to recover damages for injuries to the person of the plaintiff, claimed to have been caused by the negligence of the defendants in the management of one of their street railroad cars, upon which the former was a passenger.

By the court, BARBOUR, C. J.—It appeared upon the trial that the plaintiff, an old lady, entered the car in Seventh avenue, near 26th street, intending to go to the Central Park, when the car arrived at a switch near 53d street, it was stopped to enable the passengers to alight and take another car, and while it was so stopped, the horses were transferred from the northern end of the car to its southern end, and were then started to draw it that way, soon after which the plaintiff received the injuries in question.

The plaintiff testified, that she supposed at first, that the car had merely stopped there to let off the passengers, but on seeing that the horses had been taken from the north end of the car and were passing towards the other end of it, she got on her feet to go out before they should start back. Her statement in regard to the particular manner in which the injuries were received by her, was as follows: "when I came convenient to the door the horses started quickly and knocked me against the iron that lay at the dash-board. Then I thought to catch hold of the dash-board, but I missed

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it, and I went into the street." * * "I was not exactly out; I was pitched out against the platform, I was just a step from the door when the horses started, just opposite the door, very convenient to it." * * "I was within less than one step out, I was just going out of the door, and then they started very fast." * * "My right side struck against the railing that runs across the dash-board. I am sure I struck my right side." * * "*I kind of thought I would make something, but there was nothing for me to get the street, and I got the street; when I struck against the iron, I tried to get hold of something, but could not, and the next thing I found myself in the street. I fell on the left side of the street going down.*"

The plaintiff did not testify directly, that she was thrown from the car, or fell from it, either because of the starting of the horses, or otherwise; nor it appears to me, can it necessarily or even properly be inferred from the fact detailed by her, that she did fall or was thrown from the car to the street, and thus received her injuries. She merely stated that after being thrown against the dash-board, she tried to catch hold of something, but could not, as "*went into the street,*" * "*for the street*" * "*found herself in the street.*" It is impossible to determine from these statements of the plaintiff, whether she believed, when thus testifying as a witness, that she was thrown over the dash-board, as charged in her verified complaint, or that she was thrown into the street through the eastern gangway, or that, in her fright and excitement, she jumped or stepped off from the car, or whether, in fact, she was unable to state, when testifying, how she reached the street. Her answer, "*I tried to get hold of something, but could not, and the next thing I found myself in the street,*" taken in connection with the fact that she failed to explain the manner in which she reached the street from the place where she collided with the dash-board, seems to sustain the theory that she did not remember or was

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unable to state how it was done. Be that as it may, however, it is certain that the plaintiff did not testify that she was thrown off the car by the starting of the horses, and I think it may safely be assumed, that she did not state facts upon her examination, which were sufficient to prove that such was the case.

Indeed, I am fully satisfied from a careful examination of the entire case, that the evidence given upon the trial was sufficient, not only to establish the fact that the plaintiff was not thrown from the car by the starting of the horses, but that she must have jumped or stepped off of her own volition, after the car was in motion. For she was so thrown out of the car, through the northern doorway, that her right side struck against the dash-board, and she fell upon the street on the eastwardly side of the car. Now, if she had fallen backwards towards the east, after striking the dash-board opposite the door, and had landed upon the ground, her head and shoulders would have received the injury, and not her leg and ankle, and yet, the upper part of her person was unhurt. But, the point where she struck the dash-board, must have been so far from the eastern side of the car as to render it impossible for her to fall from that point into the street, and such a fall, too, *it may be observed incidentally, would have been at a right angle with the line of propulsion?* It appears to me, therefore, that the plaintiff must have taken some steps from the place where she struck the dash-board towards the eastern side of the car, before she fell; and I see no way of accounting for the breaking of her leg and the dislocation of her ankle, unless the last of those steps was from the car to the ground. If that step was taken while the car was in motion, it may well be that the injuries to her leg and ankle, were caused thereby.

The theory that the plaintiff fell immediately upon striking the dashboard, or that such fall was the direct conse-

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quence of the starting of the horses, was further disproved by the evidence of her own witness Kitchell, who stated that he saw her standing upon the rear platform after the car had started to go back ; by the testimony of Vosburgh, who stated that he saw the old lady standing on the rear of the car, and apparently waiting to get off, and shortly afterwards saw her lying in the street ; and by that of the witness Waterman, who testified that he saw her upon the street as the car was moving off, and saw her take a step, stumble, and fall there.

The plaintiff, therefore, failed to prove upon the trial, that the injuries of which she complained were caused by the starting of the horses.

Besides—even conceding, for a moment, that the injuries complained of were caused directly by the starting of the horses—I see no reason for imputing to the defendants any negligence, or want of care, in starting their horses, even though the plaintiff was standing or walking in the car, but within reach of the door. It is one of the customary and usual incidents of travel on all the street railroads, and cannot be considered negligence *per se*. But if there was negligence of the company in this regard, there was also some negligence on the part of the plaintiff, which contributed to the accident. For she saw the horses going to the south end of the car, and got up to go out, as she testified, “before they would start back.” She was, therefore, aware that they were about to start back ; and, as a careful, prudent woman, ought to have guarded against a fall, either by *putting her hand upon the door-casing, or otherwise*. In a word, if it was negligence, on the part of the defendants, to start the horses while the plaintiff was walking in the car, it was equally negligence on her part to walk there when she knew they were about to start.

I am, therefore, of opinion that the court erred in refusing to dismiss the complaint after the proofs were closed ;

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and in submitting the case to the jury; and, for that reason I think the judgment should be reversed, and a new trial directed, with costs to abide the event.

JONES, J., *concurring*.—I concur in the result, but on the sole ground that the judge should have charged as requested, that if the jury believed the testimony of witness Waterman the plaintiff could not recover.

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SUPREME COURT.

THE PEOPLE, *ex rel.* DELAZON J. SUNDERLIN agt. LEWIS B. OVENSHERE, Commissioner of Highways of the Town of Barrington.

An *alternative writ of mandamus*, should be a statement of the relator's title to the relief demanded, and should contain no allegations except such as are pertinent to that title and relief.

The *alternative mandamus* stands as a declaration or complaint, and sets forth the relator's title to the relief; in other words, his cause of action. The further proceedings under the statute are precisely like those in an ordinary action.

It is certainly an unknown practice, since bills of discovery have been abolished, for the plaintiff to apply that the defendant make a *further answer* to the allegations of the complaint; and there is no reason for any difference in this respect between an action commenced by *mandamus* and one commenced by an ordinary complaint.

There seems to be no reason why the relator should seek a *further return* in a case like the present—where the defendant undertakes to set up new matter as a defense, but fails to do it with sufficient certainty, whatever may be proper in a case like that reported in (9 *Wendell*, 429.)

A motion by the relator to compel the defendant to make a *further return* is an anomalous proceeding. And it seems that the case in 9 *Wendell*, (*supra*,) should not be considered as authority beyond the facts contained in that particular case.

Fourth Judicial Department, January Term, 1871.

MULLIN P. J. JOHNSON and TALCOTT, J.J.

APPEAL from an order made by the special term in Yates county, on motion of the relator ordering a further return to the *alternative writ of mandamus* issued in this case.

D. B. PROSSER, *for appellant.*

C. G. JUDD, *for respondent.*

By the court, TALCOTT, J.—The *alternative writ of mandamus* in this case, besides the matters which are presumed properly to come within the official cognizance of the

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defendant, was stuffed with long recitals touching the acts of third parties, at different times, and of which the defendant had not necessarily any official knowledge, and, amongst other things, the alternative writ, contains the history of a suit in the supreme court between certain parties, and which is stated to have involved the question or some of the questions touching the legal existence of the highway, which it is sought by this writ to compel the defendant to open, together with the judgment in that suit, to which neither the defendant nor any of his predecessors in office, were parties; and of which, so far as appears, they had no official or actual knowledge. The defendant has made a return to the alternative writ answering such things as he deemed material, and of which he had any official cognizance, but omitting to answer anything concerning the aforesaid suit and judgment, and various other allegations concerning the acts of third parties, and it may be, some allegations, mixed up with these other matters, which it was material and proper for him to answer. And thereupon, the relator on motion obtained the order appealed from, which again sets out in detail so much of the matters contained in the alternative writ as the relator claims have not been answered in the return, and requiring the defendant to make a further return to, and fully admit or traverse all these allegations.

The alternative writ of *mandamus* should be a statement of the relator's title to the relief demanded, and should contain no allegation, except such as are pertinent to that title and relief.

Prior to the statute of 9 *Anne*, *ch.* 20, there were no pleadings after the return.

If the return was an insufficient answer in law to the title and claim of the relator, the remedy was by a motion to quash the return and for a peremptory writ. The return was taken to be true; and if in fact, false, the only remedy of the relator was by an action for a false return. After the statute referred to, which has been substantially copied into

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our statute law, the proceedings on *mandamus* assumed the form of an ordinary action. "The *mandamus* set out the grounds of the claim of the relator to the relief sought, and answered to the declaration in other suits. To this the defendant made a return, either traversing the facts stated or, admitting those facts, and setting up new matter in avoidance. To the return, the relator either demurred, took issue thereon, or pleaded other matter in answer, as in ordinary suits."

The foregoing is a succinct statement of the practice, as made by the Chancellor in the court of errors, in the case of *The Commercial Bank of Albany* agt. *The Canal Com'rs*, (10 *Wend.*, 25,) and again reiterated by him, more at large, in *The People* agt. *The President, &c., of Brooklyn*, (13 *Wend.* 130.) This statement of the nature of, and proceedings upon, an alternative *mandamus* is sustained by all the authorities. The writ of *mandamus* is not, and never was a bill of discovery. No inquisition of the conscience of a defendant, in the nature of a bill of discovery, was known to the common law. A motion by the relator to compel the defendant to make a further return is an anomalous proceeding. No trace of it is to be found in the practice of the king's bench, and the only direct authority for such a proceeding in this state to which we have been referred, or which I have been able to discover, is the very peculiar case of *The People, ex rel. Musgrave* agt. *The New York Common Pleas* (9 *Wend.*, 429). That case did not purport to be founded on any authority, or prior adjudication, and was apparently a not much considered decision of a non-enumerated motion.

The judges of the N. Y. common pleas, had returned to an alternative *mandamus*, requiring them to seal a certain bill of exceptions or show cause, &c.—that the bill did not contain all the evidence. To this return, the relator demurred specially, for that the return did not state that the bill did not contain all the evidence *material and necessary*.

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to present the question of law raised by the bill. A motion was made to set aside the demurrer, on the ground that no demurrer can be put in, in such cases. For this proposition no authority was cited, and an examination will show the authorities to be quite numerous the other way. The brief opinion delivered by Mr. Justice SUTHERLAND, is as follows: "The motion must be granted. This court will not permit subordinate tribunals to be harassed with special demurrers to returns made by them. If the relator is dissatisfied with a return made, conceiving it to be evasive, or the construction of matters alleged in it to be of doubtful character, upon suggestion of its insufficiency, a further or supplementary return will be ordered, and thus the rights of a party as effectually protected, as if permitted to demur specially."

And this proceeding of moving for a further return is afterwards referred to incidentally in one or two cases by the same court, but no where directly presented or decided. The court in the case in 9 *Wendell*, seem to have intended to establish a new rule of practice, in substance, that defects of form such as are reached only by special demurrer in the returns of public officers to writs of alternative *mandamus* cannot be taken advantage of by special demurrer, and that where new matter is set up in the return, but not with sufficient certainty, the relator might have a remedy, analagous to the one now provided by the Code in lieu of special demurrers, namely, by a motion to compel the adverse party to make his pleading more definite, specific and certain. This is very far from authorizing a party to move to compel his adversary to make a further answer to specific and material allegations contained in the complaint, and which the plaintiff alleges have not been answered at all. On the contrary, so much of the complaint as is not denied or avoided is, if material, admitted, although we do not deem it necessary in this case to interfere with the rule laid down in the case in 9 *Wend.*, we cannot forbear re-

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marking that the ground upon which that ruling was placed, is not altogether satisfactory. It is, that subordinate tribunals should not be harrassed by special demurrers, neither, as it seems to us, should relators be harrassed by evasive and ambiguous returns, and we doubt if convenience is to be promoted by motions for a further retrun in any case, as a special motion may be quite as harrassing as a demurrer.

It has been seen that the alternative *mandamus* stands as a declaration, or, as it is now termed, a complaint, and is to set forth the relator's title to the relief, in other words, his cause of action.

That the further proceedings under the statute are precisely like those in an ordinary suit. Now it is certainly an unknown practice, since bills of discovery have been abolished for the plaintiff to apply that the defendant make a further answer to the allegations of the complaint, and we see no reason for any difference in this respect between an action commenced by *mandamus* and one commenced by an ordinary complaint. Undoubtedly, all allegations contained in the alternative writ, constituting material matter, and matter of substance, which are not traversed, or denied, or successfully avoided, are to be taken as admitted, and if the return contains no sufficient answer, the relator is entitled to his peremptory writ accordingly.

There seems to be no reason why the relator should seek a further return in a case like the present, whatever may be proper in a case like that reported in the 9th of *Wendell*, where the defendant undertakes to set up new matter as a defense, but fails to do it with sufficient certainty. Of course, where the defendant applies to amend his own return, different considerations are presented.

The order appealed from should be reversed. but without costs of the appeal.

Mr. Justice JOHNSON, concurs.

MULLIN, P. J. dissents.

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N. Y. SUPERIOR COURT.

FREDERICK W. FORD, agt. MARY ELLEN FORD.

*Appointed
Trib N. C. 175-187
54 Nov 27*

An order for the payment of a sum of money, as *alimony*, in an action for a divorce, being an interlocutory, or *ad interim*, order, cannot be enforced by execution—that process being allowed only upon *final* judgment (except for interlocutory costs); and unless, therefore, a party can be proceeded against under the statute concerning *contempts to enforce civil remedies*, there does not seem to be any remedy for their collection, unless it can be found in the power of the court to *sequester* the property of the husband, which is doubtful.

So far as the power of the court to punish contempts is derived from the statute, such power can be exercised only in the manner prescribed in the statute, and which in a case of disobedience of an order to *pay money*, is a *precept and committal to prison*.

For any other disobedience to any lawful order or decree of the court; and all other cases where attachments and proceedings as for contempts have been usually adopted and practiced in courts of record to enforce civil remedies, or to protect the rights of parties, the offending party may be committed to close custody, and deprived of the liberties of the jail.

As this case is under and within the statute, it is not necessary to assert or refer to the *common law power* of a court of record to punish contempts. The statute, it has been held, has not taken away such power.

From an examination made of the statute and of the cases bearing upon the question, *held*, that in the ordinary case of the disobedience of an order to pay *ad interim* alimony the court has no power to punish, otherwise than by a committal to prison under the 4th section of the statute (2 R. S., 534).

The right to go upon the *jail limits* is derived from the statute. (2 R. S., 433, § 40,) and not from any mandate put into the precept of committal.

It will be sufficient, therefore, if the precept recites the order for the payment of money, and contains a command to the sheriff to commit the person to prison. It will then become a question between the prisoner and the sheriff whether the former should be allowed to go upon the limits of the jail. (*The case of Ward agt. Ward*, 6 Abb., N. S., 79, holding that the precept must be in form to entitle the prisoner to the jail limits, not concurred in.)

Special Term, April, 1871.

THIS was a motion upon an order to show cause why an *attachment* should not issue against the plaintiff, for contempt in disobeying an order for the payment of temporary alimony.

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In November, 1870, an order was made requiring the plaintiff to pay a sum specified in the order, to the defendant for her support during the pendency of the action.

The action was for a divorce.

The order was served on the defendant, and payment of the sum mentioned in the order, demanded. On his neglecting to pay, the order to show cause was made.

S. HIRSCH, *for the motion*.

D. MCADAM, *opposed*.

MONELL, J.—The Revised Statutes (2 R. S., 534, § 1) provide that every court of record shall have power to punish, by fine and imprisonment, or either, any neglect or violation of duty, or any misconduct by which the rights or remedies of a party in a cause depending in such court may be defeated, impaired, impeded, or prejudiced, in the following, among other cases (*subd.* 3). Parties to suits, for the non-payment of any sum of money, ordered by such court to be paid, in cases where by law execution cannot be awarded for the collection thereof; or for any other disobedience of any lawful order, decree, or process of such court.

There is a further provision, granting the same power in all other cases, where attachments and proceedings as for contempt, have been usually adopted and practiced in courts of record, to enforce civil remedies of any party to a suit, in such court, or to protect the rights of such party (*subd.* 8.)

In the several cases specified in the statute, *except* that of an order for the payment of money, proof of the misconduct must be furnished to the court (§ 3), and a reasonable time given to the accused party to make his defense. The mode of proceeding is then prescribed: either an order to show cause, or an attachment (§ 5), the adjudication (§§ 19, 20), and the punishment (§ 20).

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The "fourth" section provides that when an order of a court shall have been made for the payment of costs, *or any other sum of money*, and proof shall be made of the personal demand of such sum of money, and of a refusal to pay it, the court may issue a precept to commit the person so disobeying to prison, until such sum and the costs and expenses of the proceeding be paid.

These provisions of the Revised Statutes have not been repealed, nor, as far as I can discover, impaired, or affected by any subsequent statute [except in relation to the payment of interlocutory costs (*Laws*, 1847, p. 491, § 2), the act to abolish imprisonment for debt (*Laws*, 1831, ch. 300, § 2), and the Code (§ 471), expressly excepting proceedings as for a contempt from their operations.] The act of 1847 merely exempts *parties* from imprisonment, for non-payment of *interlocutory costs*, leaving the provision concerning the payment of money, *other than costs*, untouched.

The order in this case, is for the payment of a sum of money as alimony, in an action for a divorce. This being an interlocutory or *ad interim* order, it cannot be enforced by execution, that process being allowed only upon *final* judgment; (except for interlocutory costs,) (*Code*, § 283, *Hosack* agt. *Rodgers*, 11 *Paige*, 603, *Fassett* agt. *Talmadge*, 14 *Abb.*, 188,) and unless, therefore, a party can be proceeded against, under the statute concerning contempts to enforce civil remedies, there does not seem to be any remedy for their collection, unless it can be found, in the power of the court to sequester the property of the husband. (2 *R. S.* 148, § 60.) But even, if that statute gives the power to sequester property in cases of *ad interim* alimony, which is doubtful, it furnishes, at most, a mere cumulative remedy, and does not take away the power of the court, if such power exists under the statute concerning contempts.

In so far as the court has power in a proper case to require the payment of a sum of money, to enable a party

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to carry on or resist a suit, for a divorce, it is sustained by the letter of the statute, (2 R. S., 148, § 58,) which in terms gives to the court a discretionary power, to require the husband to pay a sum of money for such purpose. But it was objected by the defendant, that the order in this case, merely *requiring the payment of temporary or ad interim alimony*, was not sustained either by the letter or spirit of the statute.

If I felt at liberty to look at this as an original question, I should find some difficulty in overcoming the doubt, I entertain in regard to it, which arises from the omission to provide for it, in the 58th section of the statute; but I do not feel at liberty to do so, partly because I am qualifiedly bound to assume the power from the order itself, it not having been appealed from, but chiefly, because of the general and uniform recognition of the power in all courts having cognizance of the subject. In *North agt. North*, (1 Barb. Ch. R., 241,) the question was directly presented, and the chancellor, held, that the court had the power independently of the statute; the power is also fully recognized in *Denton agt. Denton*, (1 Johns. Ch., 364;) *Kirby agt. Kirby*, (1 Paige, 261;) *Graves agt. Graves*, (2 Id., 62;) *Mix agt. Mix*, (1 Johns. Ch., 108;) *Jones agt. Jones*, (2 Barb. Ch. R., 146;) *Purcell agt. Purcell*, (3 Edw., 194,) and in numberless other cases. It is also understood to be the uniform and established practice of this court, in the exercise of its discretion, to make the allowance in suitable cases. (*Betz agt. Betz*, 2 Robt., 694; *Simmons agt. Simmons*, 2 Robt., 712; 3 Robt., 669; *Boubon agt. Boubon*, 3 Robt., 715; *Strong agt. Strong*, 5 Robt., 612; *Clark agt. Clark*, 7 Robt., 284; *Hoffman agt. Hoffman*, 7 Robt., 474.)

The chancellor in *North agt. North*, (*supra*,) did not refer to the 60th section of the statute, but rested the decision upon the inherent power of the court, and independently of the statute.

While the 58th section gives power to require the pay-

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ment of money *to carry on the suit*, and omits giving power to award temporary alimony, the 60th section is more general, and provides, that when the court shall make *an order* or a decree, requiring a husband to provide for the maintenance of his children, or *for an allowance to his wife*, security, &c., may be required, and the husband's property be sequestered, &c. An order is not, technically, a decree, although a decree may be an order; and when the legislature gave power by implication, at least to make an *order*, and also a decree, for an allowance to a wife, it must be presumed that it had in view the common distinction between an order and decree; and, therefore, used the words advisedly. And as an "order" is understood to be an intermediate or interlocutory proceeding, it embraces intermediate alimony, and confers the requisite power to award its payment.

But, without pursuing the inquiry further, and assuming the order to be correct, in what manner and to what extent can it be enforced?

As an order to *pay a sum of money*, it falls directly within the "fourth" section of the statute, and the court may issue a precept to commit to prison; but, as it has been held that a person so committed, may avail himself of the liberties of the jail and of the statute respecting assignments by imprisoned debtors, (*Patrick agt. Warner*, 4 *Paige*, 397; *People agt. Bennett, Id.*, 282,) the remedy is deemed inadequate as a punishment for the offense, especially, if *Ward agt. Ward*, (6 *Abb. N. S.*, 79,) that the precept must be in *form* to entitle the prisoner to the jail limits, was correctly decided. In that case it is conceded that a precept may issue, under the "fourth" section of the statute, but that it must *in terms* admit the prisoner to the limits. But I apprehend that the latter part of the decision cannot be sustained, although I am aware that Mr. Justice SUTHERLAND, discharged upon *habeas corpus*, as is supposed, for the reason, that the precept was not in the

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proper form, a defendant who had been committed for the non-payment of alimony. (*Bishop* agt. *Bishop*, not reported.)

The statute admitting to the liberties of the jail, in effect, merely enlarges the walls of the jail, and give a *personal* right to prisoners, in the cases specified; and in a proper case, the sheriff is bound to admit to the limits. (*Kip* agt. *Brigham*, 7 *Johns.*, 168.) The right, therefore, to go upon the jail limits, is derived from the statute, (2 *R. S.*, 433, § 40,) and not from any mandate put into the precept.

It will be sufficient, therefore, if the precept recites the order for the payment of money, and contains a command to the sheriff to commit the person to prison. It will then become a question between the prisoner and the sheriff, whether the former should be allowed to go upon the limits of the jail.

But it is further claimed, that the remedy is not confined to the "fourth" section, but also falls within the "fifth" section of the statute. The latter section provides, that in "all cases other than that" specified in the "fourth" section, the court may punish the misconduct or disobedience, by a fine or by imprisonment or by both. Under that section, prisoners committed to the jail, shall be actually confined and detained within the jail, (2 *R. S.*, 437, § 61,) and shall not be admitted to its liberties.

I think, however, that it must be conceded, that if the court can issue a precept under the "fourth" section, and the order is such as is therein specified, it furnishes a complete answer to the question.

The power to impose a fine or imprisonment under the fifth section, is limited to *other* cases, and cannot be invoked, if the case falls within the "fourth" section.

The same language is used in the "third" subdivision of the "first" section, which gives first, power to "*punish*" parties for mere non-payment of money, and second for any "*other*" disobedience of any lawful order. Thus, separately providing for different causes.

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The proceeding under the fourth section, as has been seen, is summary, and requires no adjudication. Under the fifth section, it must be adjudged that the misconduct was calculated to, or actually did, defeat, impair, impede or prejudice the rights or remedies of the party; and upon such adjudication, the court may impose a fine, &c.

The neglects, violations of duty and misconduct, which may be punished as contempts, are many, and different from that, which relates to the non-payment of money; and they are such, as may very properly be regarded as calculated to defeat, impair, impede or prejudice the rights or remedies of a party.

But the non-payment of money, or the disobedience of an order for the payment of money, is not calculated to have such effect, and it was probably for that reason, that it was separated from other causes, and specially provided for in the fourth section. The statute has preserved the distinction between criminal contempts, such as directly affect the dignity, or impair the respect due to the authority of the court itself, and contempts which merely affect the rights or interests of parties; and has in effect divided the latter into two classes, making the disobedience of an order to pay money, a separate and distinct cause, and providing for it, a separate and distinct remedy; and by prescribing a different remedy for all *other* cases, has limited the power of the court, in cases of orders for the payment of money, to the proceeding prescribed by the fourth section of the act.

This separation of the causes of contempts, and dividing them into two classes: 1. Disobeying an order for the payment of money; and, 2, Contempts other than for the payment of money, was recognized in the late court of chancery (2 *Barb. Ch. Pr.*, 269, *st seq.*), where the first class was uniformly punished by proceeding under the fourth section.

So far, therefore, as the power of the court to punish contempts is derived from the statutes, such power can be ex-

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exercised only in the manner prescribed in the statute, and which, in a case of disobedience of an order to pay money, is a precept and committal to prison. For any other disobedience to any lawful order, or decree of the court, and all other cases where attachments and proceedings as for contempts, have been usually adopted and practiced in courts of record, to enforce civil remedies, or to protect the rights of parties, the offending party may be committed to close custody, and is deprived of the liberties of the jail.

As this case is under and within the statute, it is perhaps not necessary to assert, or refer to, the common law power of a court of record to punish contempts. The statute, it has been held, has not taken away such power. *People agt. Nevins* (1 *Hill*, 154); *Dias agt. Merle* (2 *Paige*, 494), and the design of the eighth subdivision of the first section of the statute concerning contempts, was probably designed and enacted for the purpose of continuing the common law power, at least in cases not specifically named in the statute. (*Brockway agt. Copp*, 2 *Paige*, 578). Yet the revisors, in their notes say (5 *Edmond Ed. Stat*, 502): "In this section an examination of the general cases has been made, *as well to define as to limit a power*, which while it is absolutely necessary in many cases, is yet perhaps more liable to abuse than any other possessed by the courts." And they further say that they have included, "all cases which a diligent examination of all the writers on the subject has discovered, and which, it is supposed, ought to be included." But in a note to the article concerning *criminal* contempts, (*Ibid*, 426), the continuance of the common law power, in respect to such contempts, is clearly implied. They say, they have pursued their general plan, "to define and limit *undefined* powers *wherever it was possible*, as well for the information as the protection of the citizen."

The case of the *People agt. Nevins* (*supra*), so far as it is an interpretation of the statute concerning civil contempts, is, I think, in hostility to the intention of the legislature, as

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defined by the revisors; at least, it is quite doubtful if the legislature did not intend to limit the common law power to cases not enumerated in the statute.

The report of that case does not disclose the precise nature of the contempts. It was a proceeding against an attorney for not paying money directed to be paid by an order of the court. But whether it was money collected by the attorney for his client does not appear. It was there held, however, that the attorney could be committed under the common law powers of the court, and independently of the statute. COWEN, J., referring to the fourth section of the act concerning civil contempts, says, that it was enacted to avoid the circuitry of an order to show cause or an attachment, and therefore gives an execution forthwith, which it calls a precept; "but that the statute nowhere forbids the court to proceed in the former common law mode; but merely provides that it *may commit* in a particular form short of that."

The question in that case arose upon a *certiorari* to review proceedings upon a *habeas corpus*, whereby Nevins was discharged from custody; and all that was really decided was, that the officer had no jurisdiction and could not inquire as to the sufficiency of the commitment. From the facts as far as they are disclosed, it might have been a criminal contempt. A neglect or refusal of an attorney to pay money to his client, might very properly be adjudged a "wilful disobedience of an order lawfully made," within the tenth section concerning criminal contempts. If that was the nature of the contempt, then the interpretation of the statute in that case was consistent with the intention of the legislature.

This distinction between contempts is clearly expressed in the revisors' notes above referred to. They say: "A solid and obvious distinction exists between contempts, strictly such, and those offenses which go by that name,

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but which are punished as contempts, only for the purpose of enforcing some civil remedy."

From the examination I have made of the statute, and of such cases as I have been able to find, bearing upon the question, I am satisfied that in the ordinary case of the disobedience of an order to pay *ad interim* alimony, the court has no power to punish otherwise than by a committal to prison, under the *fourth* section of the statute.

That a state of facts might be presented which must authorize a proceeding under the other sections of the statute, is possible; but it is enough to say, that no such facts appear in this case.

The motion for an attachment must be denied. But the plaintiff, upon furnishing proof of the non-payment, &c., of the alimony, will be entitled *ex parte* to a precept to commit, &c.

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SUPREME COURT.

GRANDISON REYNOLDS, plaintiff in error, agt. THE PEOPLE
OF THE STATE OF NEW YORK, defendants in error.

On the trial of a prisoner upon an indictment for an *assault and battery with the intent to commit a rape*, if the evidence is clearly insufficient to warrant or justify a conviction for that offense, an exception to the refusal of the court so to rule, or charge, is well taken the same as though it had been a civil action :

Held, that this case was entirely bare of any and all evidence to prove an intent to commit a rape. Taking the testimony of the girl herself, in its fullest length and breadth, it was not clear, beyond doubt, that even a simple assault and battery was committed.

It is quite certain however that had the prisoner had sexual intercourse with her at the time, with no more resistance on her part than appears from her testimony, he could not justly have been convicted of a rape, within the rule established in the *People agt. Morrison*, (1 *Park, Cr. R.*, 625,) and the *People agt. Abbott*, (19 *Wend.*, 192) At most the testimony would have made but a "mixed case," and her *quasi assent* would have been presumed from such mere passive resistance.

Where the indisputable evidence in such a case, is such as to raise only a suspicion or conjecture of the criminal intent, it is clearly insufficient, and the court should so charge the jury.

Where the court under the evidence, submit to the jury the felonious intent to commit a rape, (together with the crime of assault and battery,) against the prisoner's objection and exception, and the jury find a verdict against the prisoner for simple assault and battery, it is error for which the judgment will be set aside and a new trial ordered. It was calculated to, and the presumption is that it did prejudice the prisoner's defense on the other branch of the case.

*Fourth Judicial Department, Rochester General Term,
March, 1871.*

MULLIN, P. J. JOHNSON and TALCOTT, J.J.

THE plaintiff in error was indicted for an assault and battery with intent to commit a rape upon one Celia Wood, at Clayton, Jefferson county, and was tried upon the indictment in the Jefferson county sessions on the 12th day of September, 1870. The alleged crime was claimed to have been committed in March previous. The complainant was

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then over eleven years of age, and the prisoner was nineteen. The complainant was the principal witness for the people, and swore that the prisoner who lived with his parents, near the complainant's father, came to the house where complainant and her two younger sisters were,—their father and mother being absent from home,—for the purpose as he said, of procuring her mother to make him some shirts. Considerable talk and play took place between the complainant, her sisters and the prisoner.

The two younger girls at the request of the prisoner, went up stairs, and thereupon, the prisoner took hold of the complainant, laid her upon a bed in the room, pulled up her clothes, unbuttoned her drawers and laid himself in an indecent manner upon her person. She tried to get away and make him stop, told him to stop and let her alone. In the meantime the other girls came down stairs, and in doing so made a noise, and the prisoner desisted from any further attempts. On cross-examination, she admitted that she made no noise, or outcry during the transaction, except to tell the prisoner to stop, and try to get away. That the prisoner used no force or violence, except to throw her down, did not hurt her or tear her clothes.

At the close of the evidence for the people, the prisoner's counsel asked the court to rule,

1. That there was not sufficient evidence of force or violence on the part of the prisoner to go to the jury or warrant a conviction for the crime of assault and battery with intent to ravish.

2. That the evidence was not sufficient to warrant a conviction for any other offense, and requested the court to discharge the prisoner. The court refused so to rule, and to discharge the prisoner, and the prisoner's counsel excepted.

Before opening the case to the jury, the counsel for the defense requested the court to rule and decide as matter of law, that upon the evidence given, the only question for the

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consideration of the jury was, the question of assault and battery merely, that no intent to commit a rape could be found or inferred from the evidence which was refused, and an exception was taken. The same requests and motions were made at the close of the evidence on the whole case, with like ruling and exceptions. The counsel for the defense also requested the court to instruct the jury that the evidence was not sufficient to authorize a conviction for assault and battery with intent to commit a rape. The court refused so to charge, and there was an exception. The jury convicted the prisoner of the assault and battery only, and the court sentenced him to pay a fine of \$150, and stand committed till paid, not to exceed three months.

The prisoner procured the conviction, and the proceedings to be removed into this court by writ of error.

D. O'BRIEN, *for plaintiff in error.*

I. The evidence in this case—assuming that all the testimony of the complainant is true—was not sufficient to warrant a conviction for the crime of assault and battery.

An assault is an attempt with *force or violence* to do a corporal injury to another. (*People agt. Hayes*, 1 *Hill*, 351.)

A battery is the unlawful beating of another. (3 *Bl. Com.*, 120.)

“A criminal conviction for an assault cannot be sustained where no battery has been committed and none attempted, intended or threatened by the party accused. It is indispensable to the offense that *violence* to the person be either offered, menaced or designed. There is no exception to this rule in the case of an indignity offered to a female where she is a consenting party to an act involving her own dishonor.” (*People agt. Bransby*, 32 *N. Y.*, 525.)

An improper interference with the person of a female, if with her express or implied consent, does not amount to the

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legal offense of assault and battery, however objectionable such conduct may be, when viewed from the stand-point of a strict morality. (1 *Colby's Crim. Law*, 693, 694.)

And her passive non-resistance is, as proof of her consent, equivalent to an express permission, if the female be over the age of ten years, as in this case.

It is claimed that the defendant's motive in touching the person of the girl at all, was to have connection with her. If he intended to use force to accomplish this, and overcome any resistance she might offer, he was guilty of an assault and battery with intent to ravish, and this is the offense charged in the indictment. It would be absurd to claim that a conviction for *that* offense could be sustained upon the evidence. The absence of *force or violence*, and the evidence of the express or implied assent of the girl, would be fatal to such a conviction. It is submitted that the same considerations furnish a complete answer to the charge of assault and battery. The case is entirely barren of the elements which go to constitute this offense.

1. When the relations existing between the complainant and the defendant are considered, it is perfectly apparent that no force or violence was *intended*. The girl was nearly twelve years old, the boy nineteen. They had been brought up together and had played together before. He went to the house to see the girl's mother on business, and while waiting for her to return, he was engaged in building a fire, playing and examining pictures with this girl and her sisters,

2. No force or violence was *used, attempted or threatened* by the defendant. The girl herself swears to this.

3. It is quite clear that the girl assented expressly or impliedly to what was done. It is true she says she told him "to stop," but it is apparent from her conduct that this was a mere matter of form, and so understood by the boy and by her.

4. They had been sitting together on the bed. He took

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her up afterwards and put her on the same bed, and she made no resistance by word or action. They lay by the side of each other on the bed, and he quietly unbuttoned her drawers, without the slightest resistance or even a word of reproof. Indeed the only word the girl remembers using during the whole transaction is the word "stop."

Now the assault and battery if there was one, must consist in the act of the defendant in taking up the girl in his arms and laying her on the bed, or in afterwards unbuttoning her drawers, or both. The whole thing was conducted with so much gentleness that it seems absurd to claim that the element of force or violence entered into it in any form whatever. It was undoubtedly a gross impropriety on the part of both of these young persons, but I submit that it does not rise to the proportions of a *criminal offense*, calling for the interposition of the criminal law. If it does then, in the language of Judge PORTER, in the case of *The People agt. Bransby*, (32 N. Y., 535,) "Seduction and criminal conversation have been indictable offenses in this state from the beginning, for they always involve a sufficient degree of force to constitute an assault and battery, except for the express or implied assent of the party."

An examination of the case of *The Queen agt. Read and others*, (13 *London Jurist*, 68;) *Martin's Case*, (38 *Eng. Com. L.*, 85;) *Meredith's Case*, (34 *Eng. Com. L.*, 539;) *Banks' Case*, 34 *Eng. Com. L.*, 531;) and the other cases cited by the learned judge in *The People agt. Bransby*, will show how the courts, both in England and in this state, have uniformly declined to magnify transactions of this character to the standard of offenses against the criminal Code.

The evidence did not establish an assault and battery, and the county judge erred in refusing to discharge the defendant at the close of the case for the people, and to so instruct the jury.

II. The complainant was, from her age, as capable in the

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eye of the law of consenting to any liberties the defendant took with her, as if she was thirty years of age. If she consented to what was done, or *made no opposition to it*, she cannot complain of it as an injury. *Volenti non fit injuria*. It is not claimed that the defendant had connection with the girl, or injured her in the slightest manner. Indeed, from the appearance of his clothing at the time, there is no proof that he intended to have such connection. The most that is claimed that he lay by the side of her on the bed, unbuttoned her drawers, and put his hand indecently upon her person. All this took time to accomplish, and there was no opposition by word or action from the girl—no noise or outcry, though the two sisters were in the house, and no force or violence on the part of the boy. Is not this *consent*? How absurd to claim that there was violence on the part of the boy or unwillingness on the part of the girl sufficient to constitute an assault and battery with intent to *ravish*, or even simple assault and battery. There perhaps never was an improper intimacy between a boy and girl that had not in it as much of the elements of legal crime as is to be found in this case.

The story of the girl was evidently dictated by her mother, but even with this assistance it is so unreliable and contradictory that it is unsafe to convict any person of any criminal offense upon such testimony.

III. The request made by the defendant's counsel to the court to rule as matter of law, that the only question for the consideration of the jury was the question of assault and battery merely, that no attempt to commit a rape could be found or inferred from the evidence, was proper, and should have been granted, and the refusal of the court so to rule was error. There was not the slightest evidence of the intent to ravish, and the court should have relieved the jury from the consideration of the higher offense. The ruling amounted to a judicial declaration from the bench that

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there *was* evidence upon which the jury might find an intent to ravish. It afforded an opportunity to compromise opinions and had a tendency to prejudice and mislead the jury.

VI. The court below erred in refusing to instruct the jury as requested; and especially in refusing to instruct the jury "that there was not sufficient evidence in the case upon which to convict of an assault and battery with intent to commit a rape." It will not be denied that this was a sound and correct proposition. It applied to the very offense charged in the indictment. The defendant had a right to demand that it be given to the jury with the sanction of judicial authority, and the court had no right to refuse it. It will not do to conjecture, and say that the defendant has not been injured by the error, inasmuch as the jury have found him guilty of the minor offense. Who can say that the jury would have convicted him of any offense if the court had charged as requested? In the language of the court, in *The People* agt. *Bransby*, p. 535: "It is the right of the citizen accused of crime, to claim the benefit of a fair trial, and a true and just exposition of the law applicable to the offense charged. When the law in such a case has been erroneously presented, it should not be assumed on mere speculation, however probable or plausible, that the jury were not misled by the error of the judge." The court, in effect, told the jury that there was evidence upon which they might, if they saw fit, convict of the higher offense. It was giving a judicial construction to the evidence, and the jury, logically following it, concluded that if the evidence authorized a conviction for the higher crime, then it certainly did for the lower. It is easy to see how such a presentation of the law might, and in this case did, prejudice and mislead the jury.

V. The jury, after deliberating four hours, were unable to agree on a verdict. The court refused to discharge them, and they were kept together during the entire night, and

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their verdict was evidently the result of a compromise. In this view, the refusal of the court to give them the instructions asked by the defendant's counsel, on the question of assault with intent to ravish, becomes important. On the whole, in view of the very unsatisfactory character of the evidence for the prosecution, taking the direct and cross-examination together, considering the entire absence of *violence* and the evidence of consent, or at least non-resistance on the part of the girl, the standing and good character of the boy as shown by the evidence, and the manner in which the case was presented to the jury, it is submitted that this conviction should not be allowed to stand.

P. C. WILLIAMS, *Dist. Att'y, for the people.*

I. If the court committed error in submitting to the jury the question "whether the prisoner was guilty of the offence of 'assault with intent to ravish,'" the judgment will not be disturbed on this ground. The jury corrected the error by finding the prisoner was *not* guilty of such offence, and no injury was done the prisoner.

II. The evidence is abundant to sustain the verdict of "assault and battery."

The jury saw the parties and heard their stories, considered their respective ages, and under a very fair and impartial charge by the court, rendered this verdict. Their decision should not be disturbed.

III. The prisoner insists the evidence don't show sufficient resistance by the prosecutrix, and this court is asked to say that the jury were *bound* to find she *consented* to what was done by the prisoner on the occasion in question,

There is a line of decisions establishing; without doubt, the doctrine that in cases of *rape*, there must be the *utmost resistance* on the part of the prosecutrix.

Where, however, the crime of rape is not *accomplished*, but *attempted* merely, the resistance need only be sufficient

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to prevent such accomplishment, or to repel the attack. Should the prosecutrix offer any further resistance, she would herself be guilty of "assault and battery," or some higher offense, as the case might be. For instance, suppose in this case, the prosecutrix had used a knife or pistol upon the person of the prisoner, when the resistance she *did* offer was sufficient.

The present case, however, according to the finding of the jury, was not even "an assault with intent to ravish," but simply an "indecent assault." The prisoner evidently attacked the prosecutrix with intent to have connection with her if he could do so quietly, but not by absolute force.

Certainly the rigid rule in cases of *rape*, even if it be applicable to cases of "assault with intent to ravish," can have no practical application in cases of this kind.

IV. The judgment of the court of sessions of Jefferson county should be affirmed, and the record remitted to that court to carry the judgment into effect.

By the court, JOHNSON, J.—I am of the opinion, that the county judge, at the close of the people's evidence on the trial, ought to have ruled and held as requested by the prisoner's counsel, that there was not sufficient evidence of force and violence to go to the jury, or to authorize a conviction for the crime of assault with the intent to commit a rape; and also, that he ought to have so instructed the jury. If the evidence was clearly insufficient to warrant or justify a conviction for that offense, the exception to the refusal so to rule or charge is well taken, the same as though it had been a civil action (2 R. S., 736, § 21). The judge, in his charge, instructed the jury that in order to convict they must find from the evidence, that "the prisoner assaulted this girl with the intent to have sexual intercourse with her, against her will, and against all resistance she might offer." This is the true rule of law, undoubtedly, in

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cases of this kind. But, I think, the case is entirely bare of any and all evidence to prove *such* criminal intent. Taking the testimony of the girl herself, in its fullest length and breadth, it is not clear, beyond doubt, that even a simple assault and battery was committed. It is quite certain, however, that had the prisoner had sexual intercourse with her at the time, with no more resistance on her part than appears from her testimony, he could not justly have been convicted of a rape, within the rule established in *The People* agt. *Morrison*, (1 Park Cr. R. 625,) and *The People* agt. *Abbott*, (18 Wend., 192,) at most the testimony would have made but "a mixed case," and her *quasi* assent would have been presumed from such mere passive resistance. Her younger sisters were, confessedly, in an adjacent room in the house, and within call and hearing of any outcry, and conversation was more or less being carried on between them and the prisoner and complainant, during the whole time. The prisoner, undoubtedly took grossly improper liberties with the complainant, whether with or without her consent. But, granting that what was done, was done wholly against her will and consent, what evidence is there that he intended to go farther and have sexual intercourse with her "against all the resistance she might offer." He made no verbal threat of that kind, and according to her testimony did not unbutton, or place himself in a condition in which it would be possible for him to do such an act. The evidence, at most, raises but suspicion, or conjecture, that such might have been his intention. But that is not enough. In view of all the facts and circumstances, the balance of probabilities, even, seem greatly the other way. Where the indisputable evidence is such as to raise only a suspicion or conjecture, it is clearly insufficient, and the court should so charge the jury. The counsel for the people—while he does not, in terms, dispute the proposition that it was erroneous to submit the question of the intent to ravish to the jury, upon the evidence—insists that no

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injury was thereby done to the prisoner, because the jury found him guilty of a simple assault and battery only. But the question is, whether it did prejudice, or had a tendency to prejudice, the prisoner in his defence to the entire charge against him. The charge laid in the indictment included a simple assault and battery as well as the higher crime. The prisoner denied all unlawful force and violence. The refusal of the judge to charge as requested, and on the contrary, submitting the question of the felonious intent to the jury, were in substance and legal effect a charge and direction to the jury, that they would be justified in finding such felonious intent from the evidence. No one can fail to see that this was calculated to prejudice the prisoner's defense on the other branch of the case, and the presumption must be that it did so. Indeed, such a ruling from the court could scarcely result otherwise than in a conviction for the lesser offense if not the greater, at the hands of the jury. Had the case turned merely on the question whether a conviction for a simple assault and battery was warranted by the evidence, we should probably not have felt at liberty to interfere. But upon that question the prisoner was obliged to go to the jury with the weight and cloud of this ruling against him, and we cannot fail to see that the ruling may, and indeed that it necessarily must, have operated to his prejudice with the jury. The error was, therefore, material and the judgment must be reversed, and a new trial ordered at the court of sessions of Jefferson county.

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N. Y. SUPERIOR COURT.

ANN HODNETT, respondent, agt. MACPHERSON SMITH *et al*
appellants.

The change in the law, which allows parties to be witnesses, has not changed the rule that the execution of an instrument under seal must be proven by the subscribing witness

Consequently, where the attendance of the subscribing witness cannot be had, proof of due diligence, such as would govern a prudent man in a sincere search for the witness, is still necessary.

If such proof be satisfactory, the signature of the witness may be proven; and when it appears that this cannot be done, and not before, proof may be given of the handwriting of the party who executed the instrument.

General Term, March, 1870.

Before MONELL, McCUNN, and EREEDMAN, J.J.

APPEAL from a judgment entered in favor of the plaintiff upon the verdict of a jury and from an order made at special term, denying defendant's motion for a new trial upon a case. The complaint alleged a conversion by defendants of plaintiff's property, consisting of the contents of a liquor store. The defendants, by their answer, justified, under executions issued against John Hodnett, plaintiff's husband, and claimed that the property levied upon and taken was, at the time of such levy, the property of said John Hodnett, or that said John Hodnett had an interest therein liable to levy and sale under execution. The main point involved in the case, as the court charged, was, whether the various transactions were a mere device by which the wife should be put forward as being the ostensible, whereas, in fact, the husband still remained the real owner, or whether it was a *bona fide* transaction, whereby the title to this property became vested in the wife absolutely, as her own property. To substantiate her claim plaintiff offered in evidence a bill of sale of said property, executed by William Dooling to her under seal, and which purported to have been sealed and delivered in the presence of one J. C. Wadsworth as subscribing witness. The evidence

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showed said Wadsworth to be an attorney-at-law, who, at said time, had his office in Duane street, in the city of New York. William Dooling proved his own signature, and testified that he did not know where J. C. Wadsworth was. Counsel for plaintiff then called as witness Florence Leary, who, upon this point, testified as follows: "I know Mr. Wadsworth. I believe he is out in Omaha. He is subscribing witness to the bill of sale." *By the court*: Q. How do you know he is in Omaha? A. I heard he had left and went there. Q. Who did you hear it from. A. A bookseller he used to deal with told me, I heard it from a friend of his, Mr. Benedict, in his office, who told me he had gone out there. Counsel for the defendants objected on the grounds that the paper was not proved—that the subscribing witness should prove it—that his absence was not excused. The court overruled the objection and admitted the bill of sale, to which ruling defendant's counsel duly excepted.

N. A. CHEDSEY and A. J. VANDERPOEL, *for appellants*.
C. A. HENRIQUES, *for respondent*.

By the court, FREEDMAN, J.—The bill of sale was an important piece of evidence, and well calculated to exercise a strong influence over the jury. If no sufficient foundation was laid for its introduction, an error was committed by receiving it in evidence. Being an instrument under seal, there was no question that plaintiff was bound to prove its execution by the subscribing witness, or to show by competent evidence that he could not be produced, or was incapable of being examined (*Hollenback agt. Fleming*, 6 Hill, 303, and authorities therein cited), unless the change in the law, which allows parties to be witnesses, has altered the rule or afforded a reason for dispensing with it. That such is not the case has been distinctly held by the supreme court and the court of common pleas (*Jones agt. Underwood*, 28 Barb., 481; *Story agt. Lovett*, 1 E. D. Smith, 152; see also

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King agt. *Smith*, 21 *Barb.*, 158). I can see no reason why this court should hold otherwise. Proof of due diligence, such as would govern a prudent man in a sincere search for the missing witness is, therefore still necessary to let in secondary proof (*Van Dyne* agt. *Thayre*, 19 *Wend.*, 162). Where the failure to produce the subscribing witness has been satisfactorily accounted for, the genuineness of the signature of such witness may be proven; and when it appears that this cannot be done, and not before, proof may be given of the handwriting of the party who executed the instrument (*Willson* agt. *Betts*, 4 *Den.*, 201; *McPherson* agt. *Rathbone*, 11 *Wend.*, 96). In the present case, no objection was made upon the ground of the absence of proof as to the genuineness of the signature of the subscribing witness, and consequently it cannot be raised on appeal for the first time. But the objection that the absence of the witness had not been accounted for, was distinctly taken. Upon examination of the case I am unable to find any evidence tending to show that plaintiff used due diligence, or any diligence whatever, to procure the attendance of the subscribing witness. In fact, there is no evidence that plaintiff made or caused to be made, any effort in this direction. It does not appear that Leary was authorized or requested to look for such witness. He simply swears that he believes the witness went to Omaha, because a bookseller and a friend of the witness had told him so, but does not show that these persons knew or were in position or likely to know the fact. Nor does he specify the time of the receipt of this information. No circumstance is stated from which either the fact or the time of the departure of the witness could be reasonably deduced. For all that appears the witness might have gone and returned at least one year before the trial. This is clearly insufficient. The judgment and order appealed from should be reversed and a new trial ordered, with costs to appellants to abide the event.

MONELL and McCUNN, JJ., concurred.

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SUPREME COURT.

BETSEY ANN SQUARES agt. JAMES M. CAMPBELL.

The act of 1867, chap. 814 amending chapter 459 of the laws of 1862, authorizing the seizure of animals trespassing on a private enclosure (or in public highways,) is constitutional and valid. (*This agrees with the case of Cook agt. Gregg, said to have been tried at the Madison circuit in October 1868, and judgment affirmed on appeal at the general term held in the sixth judicial district in January 1870. PARKER, J. writing the opinion, which has not been reported; and Fox agt. Duncel 38 How., 136; but is adverse to McConnell agt. Van Aerman, 56 Barb., 534.*)

Delaware Special Term, May. 1871.

THE defendant in pursuance of chapter 814 of the laws of 1867, amending chapter 459 of the laws of 1862, on the 13th day of July, 1869, seized a colt of the plaintiff's, of the value of \$150, which was trespassing upon his private enclosure. He immediately endeavored to make complaint to a justice of the peace of the town where the seizure was made in accordance with the requirements of said act. Before he had succeeded in doing so, the plaintiff brought this action of replevin to recover the possession of the property. The defendant justified under said act. On the trial, the court directed a verdict for the plaintiff. The defendant moves for a new trial on a case and exceptions.

WM. GLEASON, *for plaintiff.*F. JACOBS, Jr., *for defendant.*

MURRAY, J.—On this motion, two points are presented for consideration. *First:* Is the said act as amended constitutional in authorizing the seizure of animals trespassing on a private enclosure? *Second:* If it is con-

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stitutional, was the defendant in this action protected in seizing and retaining the colt as he did, before any complaint was made?

In section 2 of chapter 459 of the laws of 1862, it is provided that it should be lawful for any person to seize and take into his custody and possession any animal which might be in any public highway, and opposite to land owned or occupied by him, or which might be trespassing upon premises owned or occupied by him.

Section three provides that on such seizure it shall be the duty of such person to give immediate notice to some justice of the peace or commissioner of highways in the same town, and that the justice or commissioner should give notice that the animal would be sold at a certain time and place, and on that day, sell the same at public auction, and out of the proceeds of the sale, pay officer's fees, and persons making the seizure, certain sums for each animal seized, and a reasonable compensation for keeping them to be estimated by the justice or commissioner and pay the surplus to the owner.

In the case of *Rockwell agt. Nearing*, (35 N. Y., 302,) the constitutionality of this act was brought in question. It was virtually conceded, in the court of appeals, to be constitutional in authorizing a seizure of animals running at large on a public highway, but in authorizing a seizure of animals trespassing on a private enclosure, it was held to be unconstitutional. The reason for this decision was that it deprived the owner of his property without due process of law, in violation of section six, article one of the constitution of the state. The reasons are very clearly and satisfactorily stated in the able opinions of Judge PORTER and Justice MORGAN. This decision was made at the March term of that court, in the year 1866. On the 9th of May 1867, the legislature, by an amendment to said act, (*chap.* 814,) attempted to remove the constitutional objections to it. In citing the provisions of the amended act and in the

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consideration thereof, I will only refer to it so far as it relates to private trespasses.

In section two it is provided that it shall be lawful for any person to seize and take into his custody, and retain until disposed of as required by law, any animal which may be trespassing on premises owned or occupied by him. Section three provides that on such seizure, it shall be the duty of such person to make immediate complaint in writing under oath, stating the facts, to a justice of the peace of the same town, and that such justice shall, thereupon have jurisdiction to hear and determine such matter, and shall, thereupon proceed in the same manner as in civil actions, except as specially changed by said act. And shall, forthwith issue a summons, stating the fact of such seizure and complaint, and requiring the owner or any party interested in the property seized, to show cause at a time and place specified to be not less than ten nor more than twenty days from the date thereof, why the animals seized should not be sold, and the proceeds applied as directed by the act. The summons to be served by a constable, or an elector duly appointed by the justice for that purpose—the service to be made by posting it in six different public places in the town. On the return day, the complainant and any person interested in the property or his agent, may appear and join issue, by the claimant filing an answer under oath denying the matters alleged in the complaint. That the subsequent proceedings shall be as in civil actions so far as they can be under the act. The issue is to be tried by a jury if either party desires it. If no person appears as claimant, and files an answer, or if on the trial the justice or jury shall find against him, the justice shall issue a warrant for the sale of the property. The sale to be conducted as a constable's sale—the proceeds to be paid to the justice. After which he shall adjudge the costs of the proceedings allowing the same fees as in civil actions, and allow the party seizing a certain sum for each animal seized, together with

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the actual damages sustained by reason of the trespass, and a reasonable compensation for the care and keeping of such animals to be estimated by the justice. The justice to be allowed one dollar for each animal sold. All to be paid by the justice out of such proceeds, and the surplus to the owner.

By section four provision is made for the owner demanding and receiving a return of his animals on the payment of certain sums.

Section six provides for an appeal from the determination of the issue joined to the county court of the county.

Section seven provides, that on a determination of the issue against the complainant, the justice shall render a judgment for costs against him. If the justice or jury shall find the complaint to be malicious and without probable cause, the justice or jury shall assess the damages sustained by the owner of the animals, by reason of such seizure, and the justice shall render judgment for double the amount assessed with costs.

The differences between the act as amended and the original act, mainly are, that the amended act provides for a regular and orderly judicial proceeding, and judgment by virtue of which the property is sold. The original act does not. The amended act also, provides for the person making the seizure recovering his damages by reason of the trespass, through the instrumentality of the proceeding. The original does not.

It has also been claimed, that the act as amended is unconstitutional on the same grounds as the original. The point has been distinctly made in a number of cases. In the case of *Cook agt Gregg*, tried at the Madison county circuit in October, 1868, the point was distinctly made. That was a case of private trespass, where the property was seized while trespassing upon the lands of Gregg. The action of replevin was not brought until after the adjudication by the justice of the peace. The justice at the circuit

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held the amended act to be constitutional as to private trespasses, and the seizure and sale justified. Cook appealed to the general term in the sixth judicial district, which held the same, Justice PARKER, writing the opinion. That decision was made in January, 1870, having been argued in November, 1869. The opinion of Justice PARKER, has never been reported.

In the case of *Fox* agt. *Dunkel*, (38 *How.*, 136,) decided in October, 1869, by the general term, of the fourth district, Justice POTTER writing the opinion, the same is held.

In the case of *Campbell* agt. *Evans*, (54 *Barb.*, 566,) decided in the fifth district in June, 1869, Justice BACON, writing the opinion, the amended act was held to be constitutional as to animals running at large on a public highway. In his opinion, Justice BACON, clearly intimates his opinion, that it was also constitutional as to private trespasses.

In the case of *McConnel* agt. *Van Aerman*, (56 *Barb.*, 534,) the general term of the fifth district held the amended act to be unconstitutional as to private trespasses. This case was decided in December, 1869, before the judges had seen the decision in the fourth district. In view of that fact, in the case of *Leavitt* agt. *Thompson*, (56 *Barb.*, 542,) the same general term reconsidered and reviewed the question, and reaffirmed the unconstitutionality of the amended act as to private trespasses.

Unfortunately, the court of appeals has not passed upon the question.

With the greatest respect for the opinion of the judges of the fifth judicial district, I think, duty in this matter requires me to follow the decision of the sixth district, more especially, when another district has held the same.

But as the general term of the sixth district gave no reasons for its opinion, and it does not appear that it considered all the objections made to the law, it may be well, on this occasion, to state the reasons for sustaining it.

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Courts should proceed to the consideration of a question as to the constitutionality of an act of the legislature with great caution. It is a responsible and delicate duty courts have to perform. It is to be presumed that the act under consideration was not passed without mature reflection and full consideration of the provisions contained in it, and of the constitutional principles relating thereto. It is presumed to be constitutional. Yet, the courts have a right, and it is their duty in case they find the act to be in conflict with the constitution, to so declare it, and thus far hold it to be void and inoperative, (1 *Kent's Com.* 9th ed., 500). But so careful have courts been in the performance of this duty, that they have repeatedly held that to warrant them in setting aside a law as unconstitutional, the case must be so clear that no reasonable doubt can be said to exist. (*Fletcher* agt. *Peck*, 6 *Cranch.* 128; *U. S.* agt. *Wheaton*, 10 *Wheat.*, 53; *Parsons* agt. *Bedford*, 3 *Peters*, 433, 438; *Ogden* agt. *Saunders*, 10 *Wheat.*, 294; *Sedgwick on Statute and Const. Law*, 592; *Rosevelt* agt. *Godard*, 52 *Barb.*, 545.) Full legislative powers are vested in the legislature of the state. It performs its duties under the restraints of the constitution of the state and of the United States, (1 *Kent's Com.* 9th ed., 500).

The objection presented to the act under consideration is, that it is penal in its character, and so far as it authorizes the seizure of animals trespassing on a private inclosure it deprives the owner of his property without due process of law, in violation of section six of article one of the constitution of the state. That section, among other things, provides that no person shall be deprived of life, liberty, or property without due process of law. Judge PORTER, in the case of *Rockwell* agt. *Nearing*, very forcibly and correctly states what is meant by the words "due process of law" as used in the constitution. The whole may be summed up in these words: No person shall be deprived of his life, liberty or property, by force of a legislative enactment

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without the due course of a judicial proceeding. It is of kindred principle to the inhibition of bills of attainder in the constitution of the United States (*subd. 3, § 9, art. 1*). No law can be passed taking the property of one person and giving it to another, without the safeguard of a judicial proceeding. Legislative bodies cannot assume judicial powers and perform the duties of judges, in addition to their own legitimate functions. It can take the property of individuals for public improvements only on rendering a just compensation. It has the power to provide the ways and means by which the rights of persons may be protected and their wrongs redressed, and to compel amends to be made to the party injured from the property of the person in the wrong. But it must be made through the instrumentality of some judicial proceeding. The nature and character of the proceeding, the practice to be adopted therein, the manner in which the parties shall be brought before the tribunal to give it jurisdiction, is within the province and constitutional power of the legislature. The nature of the process to be issued and the manner of service, and what circumstances may render it necessary to omit personal service, are proper subjects for legislative regulation (*The matter of the Empire City Bank*, 18 N. Y., 214-216; *Johnson agt. Babcock*, 16 N. Y., 246).

The rules of evidence to govern the courts in their proceedings and the competency of witnesses therein are also subject to its control; also the manner of enforcing the judgments of the courts; the property that may be seized, and the manner of seizure for that purpose; when the seizure of property is necessary to secure the anticipated judgment of either of the parties to the proceeding; the manner of its seizure and detention, and under what circumstances and on what evidence and authority and through what instrumentalities, are all subjects of legislative regulation.

In applying these principles to the act in question, I can not resist the conclusion that by a due exercise of its legit-

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imate and constitutional powers, the legislature has obviated the constitutional objection existing in the original act, by providing in the amended act for a regular judicial proceeding, so as to constitute a due proceeding at law. It is not an action, but a special proceeding. It requires a complaint to be made on oath before the justice, a summons to be issued and served. In view of the fact that, in many cases, the owner of the animal trespassing is unknown, personal service is not required, but service by posting in six public places of the town is substituted. On the return of the summons, the parties may appear and join issue, and have a trial before the justice, or with a jury, as in civil actions. If the issue is found against the complainant, the justice is required to render judgment against him for the costs of the other party. If no one appears, or the issue is found in favor of the complainant, the justice is required to issue a warrant for the sale of the animals. The sale is to be made by a constable, as on an execution, the money to be paid to the justice. He is then required to assess the damages, and pay the costs, damages, compensation for keeping, and a certain sum for seizure to the captor. From this summary of the act it will be readily seen that it contains all the requirements of a regular judicial proceeding. It is, however, urged with much force, that service by posting as to a known owner of the animal seized, is not a sufficient service on which to predicate a due proceeding at law. With the propriety of the enactment, courts have nothing to do; that is for the legislature, in its wisdom and discretion, to consider. I deem it well settled that the legislature has the power to allow such service (18 N. Y., 214, 215). Service by publication is allowed; service by posting on the door of a concealed defendant is allowed. In this case, it makes one rule of service for all, both when the owner is known and unknown. If the owner was unknown, more could not reasonably be required; if known, it would be well calculated to give the person notice of the proceedings;

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so that the propriety of the manner of service cannot reasonably be questioned. The legislature is required to make general rules; it cannot make a rule for each particular case. It is, however, sufficient to say that the legislature deemed that mode of service sufficient.

That objection being removed, it is still urged that the allowances under the original act were held to be penal in the case of *Rockwell* agt. *Nearing*, in the court of appeals, and that the same are in the amended act with the addition that by virtue of the proceedings the captor is allowed to recover the damages he sustained by the trespass, and that if, as to the recovery of the damages, the proceeding is remedial in its character, as to the other allowances it is penal, and therefore not within the power of the legislature. I understand the court, in that case, to have held those allowances to be penal, and that they were made the instrument of depriving the owner of his property without due process of law, and to have held that the original act did not provide for a regular judicial proceeding. I have endeavored to show that the amended act provides for a judicial proceeding, in which the justice has jurisdiction of the parties and the subject matter. If I am right in that, the constitutional objection, held by the court of appeals, is removed. The legislature had the power to regulate the amount of the recovery in the judicial proceeding provided for. It had the power to allow the captor to recover double or treble damages. It had the power to allow him to recover, in addition to the damages upon his land, a fixed sum as an indemnity for his trouble in seizing the animals and removing them to a place of safety, also for keeping them, that the legislature has done in this proceeding. These allowances in this judicial proceeding are within the power of the legislature. There is reason for allowing to the captor more than he would in an action at law. The act is intended to meet cases where animals are wandering from place to place without a keeper, and trespassing upon

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every spot where they can enter. They are found in the grain-field, in the meadow, or the garden. They must be attended to immediately. In most of the cases, to notify the owner, if he is known, would be leaving the land-owner's property to destruction. They must be removed at once; they must be driven somewhere. If the owner is unknown, or lives at a distance, where can they be driven? To drive them on the public highway, to wander on a neighbor's land, would be to cause them to commit new trespasses. The most proper thing that can be done, is to take the animals trespassing to some place of safety. The legislature has provided that the land-owner may do so, and secures to him, by this proceeding, an indemnity.

It is further urged that a person, blameless and entirely innocent of any wrong, is liable to have his animals seized, and be compelled to pay as required by said act, which would be unauthorized. The force of the point is very much weakened by the amendment of the act by sec. 5 of chap. 424 of the Laws of 1867. However, if he is innocent of any wrong, either by himself or his animals, his animals cannot be legally seized, and he cannot be legally compelled to pay any sum. But every person is liable for the acts of his domestic animals. He is bound to keep them upon his own land. This requirement, however, is subject to the rules and regulations in regard to line fences. If animals trespass, the owner is liable for the trespass. If they are in the custody of a bailee, the owner may still be sued for their trespasses. Whenever they are trespassing they may be seized by virtue of this act. But when innocently upon another's land, they cannot legally be seized. There is, therefore, nothing in this objection.

It is also urged that the act requires only the issue to be joined, and a trial to be had upon the right of seizure, leaving the amount of the captor's damages to be afterwards determined by the justice, taking that question away from the jury. It is, therefore, claimed that the act interferes

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with the right of trial by jury. I think, that is the true construction of the act, but it is not for that reason, unconstitutional. Due process of law does not necessarily import a trial by jury. (*Winehammer agt. The People*, 13 N. Y., 378, 425.) The second section of article one of the state constitution, provides that the trial by jury in all cases in which it has heretofore been used, shall remain inviolate forever. This act provides for a special proceeding in which the main and vital issue is the right of seizure and sale. That is allowed to be tried before a jury or the justice at the option of the parties. The other questions are to be disposed of by the justice, among which is the amount of the captors damages. Those, the justice is to assess after he receives the money, and pay to the captor. Special proceedings of various characters, existed and were practiced, long before the adoption of the constitution. Proceedings too, in which the amount of damages sustained in consequence of an interference with lands was involved. Such as proceedings to ascertain the amount of damages sustained by a land owner, in having a public highway, plank road or railroad run through his lands. How those damages should be assessed, has always been subject to legislative control. As to the damages to be recovered, the proceeding is indisputably remedial in its character, and comes under the same principles and practice, and is sustained by the same reason as a proceeding to distrain animals damage feasant. In those proceedings, the damages were authorized to be assessed by the fence viewers, and such assessment has always been allowed, and sustained by our courts. There is no difference, in principle, between the two proceedings in this respect. The proceeding to distrain animals damage feasant, existed at common law, and was authorized by English statutes, and all of our own from the earliest period of our state. The legislature, therefore, was fully justified in assuming that this mode of assessing damages in such remedial proceedings, had existed

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prior to the adoption of the constitution of our state, and therefore, was not within the provisions of the constitution, giving the party an absolute right to a trial by jury. (*Matter of Empire City Bank*, 18 N. Y., 210). There is no constitutional objection to the legislature's authorizing the main issue in this special proceeding to be tried by a jury, and the damages to be assessed by the justice. It is made a part of the proceeding of which the original complaint and summons gives the justice jurisdiction. The act does not require any notice of the assessment to be given to the owner. The assessment being a part of the proceeding of which the justice had jurisdiction, the want of notice does not affect his jurisdiction of the matter or the constitutionality of the act. It might have been more wise and better if notice had been required when the owner is known, but with that the courts have nothing to do. It was for legislative discretion.

It has also been urged before me (and I am referred to a note of the reporter, to the case of *Fox* agt. *Dunkel*,) that by this act, the animals are allowed to be seized without process, and before the commencement of the proceeding, and therefore, the property is taken without due process of law. By reference to all the authorities it will be readily seen, that without due process of law as used in the constitution, does not mean the want of process by which the property is taken, but the want of a judicial proceeding in which it is taken, this act provides for a judicial proceeding, and the captor seizes and retains the property as a part of the proceeding.* He is allowed to do so, because of the

*This is the precise point at which we consider the act unconstitutional. For, with the greatest deference, we consider the "proceeding" under which the seizure is made, a *legislative* proceeding, and not a judicial proceeding, nor a part of a judicial proceeding. It does not become a judicial proceeding so as to authorize a seizure, until the court gets jurisdiction of the parties or, of the subject matter, which under this act, cannot be accomplished until complaint is made before the justice. Nor do we see any more propriety or authority for calling the act a judicial proceeding than "due process of law;" for it amounts to due process of law, if the proceeding can be called a judicial one, which authorizes the seizure of the property.

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peculiar nature of the trespass, the immediate necessity of action and of some disposition of the animals trespassing, and to secure to him the result of the proceedings. He is required to make immediate complaint so that the proceeding may at once progress, and the property be not unnecessarily detained. This means that he shall proceed as soon as he reasonably can under all the circumstances. This mode of seizure is similar in principle to allowing an attachment to issue at the commencement of an action, and the defendant's property thereby to be seized and retained until sold on an execution on the judgment obtained in the action. The mode of seizure, the circumstances rendering it necessary, by whom, and how it is to be made, and on what process if any, when in an action or judicial proceeding, are all subjects of legislative regulation. No provision of the constitution is therefore, violated in allowing the property to be seized as by this act.

It has also been urged before me that this act takes away from the owner of the property seized the right of replevin. There is nothing in the act itself that takes away the right of replevin. The right of replevin when property is seized by virtue of this act, is not taken away by section 207 of the Code, which was in force at the time that this act was passed. That being so, the property thus seized, may be replevied by the owner, but if on the trial of the action of replevin, it should be established that the seizure was lawful, the owner would be obliged to return

Suppose a person should go unlawfully upon his neighbors wood lot, and commence a willful trespass, by cutting down and destroying wood and timber, and the neighbor, by virtue of an act of the legislature similar to the one under consideration in reference to the seizure of animals, should arrest the trespasser and take him off to jail and there detain him until complaint could be made, under the act, before a justice of the peace, and a trial had and damages recovered, &c. Would any sane man assert that the defendant was not unconstitutionally deprived of his *liberty* without due process of law, or that the act of thus taking him to jail was authorized by a judicial proceeding by an act of the legislature. The principle under the case supposed we conceive to be the same as that under the case stated—One having reference to the person and deprivation of liberty, and the other to deprivation of property. [REP.]

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the property and subject it to the proceeding, or pay the sums necessary to redeem.

The conclusion to me is irresistible, that the law now gives to the owner of the property seized by virtue of this act, the same right of replevin as it did in case of distress of animals damage feasant.

If I am right in these views, the legislature has not transcended its powers in the passage of the act in question.

I am satisfied, that the constitutionality of the act can be sustained upon another principle, to wit. It is entirely remedial in its character. If so, Judge PORTER, in his opinion, in the case of *Rockwell* agt. *Nearing*, virtually concedes it would be valid. In the original act, some of the allowances were penal in their character. A recovery for the damages was not provided for, therefore, the proceeding was not penal in its character. In the amended act, a recovery of the damages of the captor is provided for, and it is the object of the proceeding, and would be a bar to any other recovery therefor. The other allowances are for costs of officers and for the trouble and expense of the captor incidental to the judicial proceeding. So that what under the former act were penal, by the amendment, are made incidental to the main object of the proceeding which is remedial, to wit, the recovery of the damages.

I, therefore, hold the amended act to be constitutional and valid. The judge in the hurry of the circuit, directed a verdict for the plaintiff in this action of replevin.

The second point is, assuming the evidence on the part of the defendant to be true, and the act to be valid, was the defendant protected in holding the property at the time of the demand?

Section two of the amended act provides, that it shall be lawful for any person to seize and take into his custody, and retain until disposed of as required by law, any animal, &c. It is required that the captor proceed with reasonable

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diligence, and make his complaint before the justice, and not unnecessarily retain the property before the complaint is made. There is nothing in the case showing want of diligence, neglect or abuse of the property by the defendant, that would render him a trespasser in holding the property, if the act under which he made the seizure, and was holding it, is valid.

The verdict must, therefore, be set aside, and a new trial granted, costs to abide the event.

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SUPREME COURT.

CHARLANA HASBROUCK, by her guardian, Cornelius Hasbrouck, respondent, agt. CHARLES BOUTON, appellant.

Where a daughter received, as a gift from her mother, an ewe lamb, and an agreement was made at the same time by the mother with her father—the daughter's grandfather—to keep the sheep for the granddaughter, upon the terms of giving the latter all the increase, and the grandfather to have the wool for the keeping; and the increase for some six years amounted to seventeen sheep :

Held, on a constable's sale of these seventeen sheep, upon an execution against the grandfather, as the property of the latter, that he had no title to these sheep; he was a mere bailee thereof; nor had he any title to the wool, until he had performed his entire contract of keeping the sheep till shearing time; and for the entire performance of this contract on his part, he was entitled to the consideration promised, to wit: the wool; and part performance, on his part, only, gave no title; and the constable, by his levy, took no other or better title than the bailee had. The title to the sheep was in the granddaughter—the plaintiff.

Third Judicial Department.

General Term, Cortland, June, 1871.

Before MILLER and POTTER, JJ.

THIS action was brought in a justice's court originally, and tried there, when the plaintiff recovered a judgment, from which an appeal was brought to the county court of Cortland county, and by reason of the relationship of the county judge, was certified into the supreme court, and tried at a circuit court, at which the plaintiff again recovered a judgment for \$65 damages. Upon a case and exceptions, a motion was made for a new trial at special term. The motion was denied, and upon the order of the special term, judgment was entered, and from that judgment an appeal is brought to this court.

The action was brought by the plaintiff, an infant, by

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her guardian, to recover for the value of seventeen sheep, which were taken by the defendant, who was a constable, by virtue of an execution issued upon a judgment in a justice's court against one George Hasbrouck. The judgment and execution were valid and fair on the face, and no question is made as to their validity.

The defendant regularly advertised and sold the property, and as to his action no question arises. The only real question on the trial, was a question of title.

LEWIS BOUTON, *for plaintiff.*

MCDOWELL & EDWARDS, *for defendant.*

By the court, POTTER, J.—The plaintiff claimed title to the property in question, first, as a gift from her mother of an ewe lamb, and an agreement then made by the mother with George Hasbrouck (the defendant in the execution under which the sheep were taken) to keep the sheep for the plaintiff, upon the terms of giving the plaintiff all the increase and Hasbrouck to have the wool for the keeping. The claim by the plaintiff is that this sheep and its increase, for some six years, amounted to some seventeen sheep. The claim of the defendant was, that these sheep and the wool upon them belonged to George Hasbrouck, and that if the sheep belonged to the plaintiff, the defendant still had a right to levy upon them and sell Hasbrouck's interest in the wool. The question of the ownership of the sheep was a question of fact, fairly tried, and found in favor of the plaintiff, and I am not able to see any question that we can review upon that point. It was the main and material issue upon the trial, and no error prejudicial to the defendant seems to have been committed on the trial upon this point.

The defendant urges the argument that the sheep in question, upon the plaintiff's theory, belonged, with special defined interests, to the plaintiff and George Hasbrouck together; the plaintiff having title to the carcass, and Has-

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brouck the title to the wool, as a consideration for the care and keeping; that the plaintiff had no right to the wool, because she owned the carcass, and that the measure of damages was wrong, because she recovered for both carcass and wool; and the questions of law were disposed of by the judge at the trial, as follows: "Although the defendant (in the execution) was entitled to the wool raised from the sheep, yet, nevertheless, the title to the sheep was in the girl, if they are the increase of the lamb, as against this defendant, who would not have a right to levy upon the wool upon the backs of the sheep for a debt against the grandfather. He has, no right to set up that claim for the wool, and the plaintiff has the right to set up the claim for the full value of the sheep."

Defendant's counsel duly excepted to that portion of the charge in which the court charged the jury that, "although the defendant (in the execution,) was entitled to the wool raised from the sheep, yet, nevertheless, the title of the sheep was in the girl, if they are the increase of that lamb, as against this defendant, who would not have the right to levy upon the wool upon the backs of the sheep, for a debt against the grandfather. He has no right to set up that claim for the wool, and the plaintiff has the right to set up the claim for the full value of the sheep," and to very part of such portion of the charge.

The defendant's counsel requested the court to charge the jury, that George Hasbrouck had an interest in the sheep claimed, for at least to the extent of the wool growing thereon, at the time of the levy and sale.

The court refused so to charge, and the defendant duly excepted.

The defendant's counsel also requested the court to charge the jury, that if George Hasbrouck had an interest in the sheep to the extent of the wool growing thereon at the time of the levy and sale, the defendant had a right to levy upon and sell such interest.

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The court refused so to charge, and the defendant duly excepted.

The defendant's counsel also requested the court to charge the jury, that if the plaintiff is entitled to recover for any of the sheep claimed for, her recovery must be limited to the value of the sheep, less that part of the value which the wool constituted.

The court refused so to charge, and the defendant duly excepted.

This presents all the questions of law, that arise in the case.

I think, the learned judge correctly laid down the law in this case. George Hasbrouck had no title to these sheep; he was a mere bailee of the sheep; nor had he any title to the wool, until he had performed his entire contract of keeping the sheep, till shearing time; and for the entire performance of this contract on his part, he was entitled to the consideration promised, to wit, the wool; and part performance on his part only, gives no title; and the defendant by his levy, took no other or better title than Hasbrouck, the bailee, had. The case of *Pierce agt. Schanck*, (3 *Hill*, 28,) illustrates the rule. The plaintiff delivered logs to a saw-mill, to be sawed under a contract with the miller, that he should saw them into boards, within a specified time, and that each party should then have one half the boards. This was held to be a bailment merely, the title remained in the plaintiff until the logs were manufactured into boards, according to the contract, that the contract was entire; the sawyer obtained no title by sawing a part of them; and also held, that the bailor could bring trover for any part of the boards that was converted before a full performance of the contract, (See *Cunningham agt. Jones*, 20 *N. Y.*, 486; 22 *N. Y.*, 162; *Jones on Bailment*, 100, 101). George Hasbrouck had no interest even in the wool, in February, that could be levied upon, and none before shearing time; which was conceded to be in June. Before that time, his interest

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was a mere contingent one dependent upon the full performance of his contract. The wool was the compensation he was to receive for keeping and supporting these sheep. There is not known in practice, and cannot be in law, such a union of interest or title, or partnership in animals as that one party shall own the carcass, the other the wool, the hair, or the feathers. Though we are not called upon to decide what interests parties might create by special contract, expressing such a union. This was no such contract.

But the defense proceeded upon no such theory in their answer, nor on the trial; they levied upon and sold the whole property, they sold the plaintiff's property as the property of George Hasbrouck; not as liable, but as absolute owner of the sheep, not the wool only, but the carcass carrying the wool with it. He took and assumed the right to sell, and did sell the plaintiff's interest in the sheep, and this title being found by the jury to be in the plaintiff, the charge and refusals to charge by the learned judge, were right; the judgment should be affirmed.

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U. S. DISTRICT COURT.

In re B. HELLER.

A register has the right to allow amendments to the schedules on the *ex parte* application of the bankrupt, at any time while the cause is pending before him, but it is the better practice, if there shall have been an appearance on the part of the creditors, to issue an order to show cause, &c., and to require due notice of such application to be given.

That it is the duty of the bankrupt to amend his schedules so as to make them conform to the facts, and that the filing of specifications does not deprive him of that right or release him from that duty.

That the register should allow all necessary and proper amendments whenever a proper cause therefor is shown.

Southern District of New York, June, 1871.

FITCH, *Register*.—Upon affidavits and upon all the pleadings and proceedings in this cause, the bankrupt moves to amend schedule A attached to his petition for adjudication in bankruptcy, by striking out certain debts which were inserted in a previous amendment through a mistake of the law, the debts having been contracted by the bankrupt since the filing of his petition.

Since the adoption of the Code of Procedure by the legislature of this state, amendments to any pleadings or proceedings are allowed virtually as a matter of course, and are within the discretion of the court, and being allowed whenever proper cause is shown. (*Sections 172, 173 and 174, of Code*).

The practice of the state courts under section one hundred and seventy-three of the Code, which section of the Code is as follows: "The court may, before or after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading, process or proceeding, by adding or

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striking out the name of any party, or by correcting a mistake in the name of a party or a mistake in other respect; or by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved," has been settled by the following decisions: Amendment before trial, matter of course, *Troy & Boston R. R. Co. agt. Tibbetts*, (11 *How.*, 170;) *Dagurre agt. Orser*, 3 *Abb.*, 86). Reasonable excuse for defect sufficient, (*Huntington agt. Slade*, 22 *Barb.*, 164;) see further, *Merchant agt. N. Y. Life Ins. Co.*, (2 *Sand.*, 659;) (2 *Code Rep.*, 66, 87;) *Chapman agt. Webb*, (1 *Code Rep. N. S.*, 388). Summons may be amended after judgment, *Sluyter agt. Smith*, (2 *Bosw.*, 673;) see also (13 *How.*, 287). Affidavits may be amended. (13 *How.*, 350.) A warrant of attachment may be amended, *Kissam agt. Marshall*, (10 *Abb.* 424). Where amendment is in furtherance of justice, but little restriction upon power of amendment, (*Van Ness agt. Bush*, (14 *Abb.*, 36;) *Beardsley agt. Stover*. (7 *How.*, 294;) (3 *Abb.*, 86.) Court will allow amendment of complaint necessary to conform it to the facts proved. (*Hunter agt. Hudson River Iron Co.*, 2 *Barb.*, 493). By section one hundred and seventy-four of the Code of Procedure, whenever any proceeding taken by a party fails to conform in any respect to the provisions of this Code, the court may, on motion, permit an amendment so as to make it conformable thereto.

The motion to amend is properly made. (*General order V.*; *In re Morford*, *B. R.*, *Supl.*, 46; *In re Perry*, 1 *N. B. R.*, 2; *In re Little*, 1 *N. B. R.*, 74; *In re Watts*, 2 *N. B. R.*, 145.) The bankrupt is required by the bankrupt act of March 2, 1867, to make his petition and schedule conform to the provisions of the law. (*In re Orne*, *B. R.*, *Sup.*, 48). And the court has authority to allow amendments to be made at any time prior to the discharge of the bankrupt.

General order V.

"He shall be at liberty from time to time, upon oath, to

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amend and correct his schedules of creditors and property, so that the same shall conform to these facts." (*United States Bankrupt Act, Section 26*; *In re Jones*, 2 N. B. R., 20; *In re Orne*, B. R. Sup., 48). In the last cited case, BLATCHFORD, J. says: "An error, whenever discovered, must be corrected, no matter what proceedings have theretofore taken place." The register may order schedule to be amended at any stage of the proceedings." (*In re Perry*, 1 N. B. R., 2). Additional amendments were allowed after the assignee had made and filed his report. I entertain no doubt of the right of the bankrupt to amend under section twenty-six, nor of the application being properly made to the register.

A bankrupt may amend schedules even after the hearing of specifications against the discharge, (*In re Preston*, 2 N. B. R., 27). In this cause leave to amend was granted by the register under section twenty-six of the act, and general orders five, seven and thirty-three. Schedule A was amended by the addition of about twenty-five creditors, among these were included the names of eight persons, the indebtedness to whom was subsequent to filing of the petition. As the discharge, if granted, could not release the petitioner from debts contracted after the filing of his petition, those creditors whose names were improperly inserted could suffer no loss or damage by the mistake. They had not proved or attempted to prove their debts, and the proceedings have not been effected in any way by their names being inserted in the amended schedules. The bankrupt, on becoming aware of the error, seeks to correct it by striking out those names from his amended schedule, and asks leave to amend by filing an amended schedule omitting the names of those eight creditors whose names were by mistake placed in the amended schedule. The mistake of placing the names of creditors whose claims did not exist previous to the filing of the petition, on the amended schedule, not having prejudiced a right of any previously existing creditor, and being, in effect, the asking of a relief which the court has no power

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to grant, is merely surplusage and the last proposed amendment, which is for the purpose of removing manifest imperfections, is an act of good faith, and the court should not merely permit the amendment, but require it to be made.

The bankrupt, on making his motion for leave to amend, states, "under oath, the substance of the matter proposed to be included in the amendments," &c., as required by general order No. thirty-three. It is not reasonable to suppose this rule was intended to restrict amendments to cases of omission. Section twenty-six of the act, and general order five and seven, are not susceptible of any such construction.

The register has power to allow amendments, and no creditor has a right to oppose such application. (*In re Watts*, 2 N. B. R., 145).

In re Ratcliffe (1 N. B. R., 98,) an amendment was allowed on condition that there should be a new warrant issued, &c., which was necessary under the circumstances of that case. So also *In re Perry*, (1 N. B. R., 2,) additional proceedings were considered necessary. *In re Morford*, BLATCHFORD, J., I consider as settling the practice as applicable to this case, (*B. R. Sup.*, 46). The register, holding chambers of the district court, either upon his own motion or upon application of the bankrupt or a creditor, or any other person having a standing in court, can make an order allowing such amendments as may be proper. The proceeding is *ex parte*, and is entirely within the discretion of the register to grant or refuse it; if applied for by the petitioner, no notice thereof is required to be given to any one, neither has a creditor a right to oppose it. Should the register refuse to allow the amendments, the petitioner has a right to appeal to the special term. Whenever any bankrupt or creditor shall make a motion before the register, at chambers, to amend the schedules or to compel the petitioner to amend his schedules, I hold the better

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practice to be, to issue an order requiring the party to show cause why the amendments as asked for should not be allowed, specifying particularly the points in which the schedules are defective. The bankrupt or creditors will then have a right to oppose the application, and appeal from the order at chambers to the special term if dissatisfied with the decision of the register. The authorities on these points are, *In re Hill*, (B. R. Sup., 4;) *In re Orne*, (B. R. Sup., 18;) *In re Jones*, (2 N. B. R., 20;) *In re Levy*, B. R. Sup., 30;) *In re Patterson*, (B. R. Sup., 22;) *In re Morford*, (B. R. Sup., 46;) *In re Watts*, (2 N. B. R., 145.)

The foregoing decisions are the same in spirit, as to the allowance of amendments as are the decisions of the courts of this state, the same liberal spirit prevailing in each; allowing amendments as a matter of course in the discretion of the court, appeals being allowed in all proper cases.

In this state the courts have, for a long series of years, allowed the most liberal amendments in all pleadings and proceedings, allowing all necessary amendments in pleadings, before, on, and after the trial of causes; no one has opposed, and the bar of the state generally approve of the practice. The act of congress requiring the national courts to follow the practice of the state courts in certain particulars, in the districts in which the United States courts are being held, enables the two courts to assimilate their practice, and enables the United States courts to avoid much of the English common law practice descended to us from the Roman law. In bankruptcy proceedings, it is in furtherance of the ends of justice, and as contemplated by the bankrupt act, that the register, holding the chambers of the district court, and acting as a United States district judge, clothed with his powers in regard to the case before him, should make all necessary orders in the case. As the registers selected by Chief Justice CHASE, and approved by the district courts, are, with few and unimportant exceptions, men of the highest order of legal talent, learned in the law, having a full

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practice in the state courts, standing high in their respective communities—many of them having had legislative and congressional, as well as judicial, experience—to such men all the workings of the bankrupt law can safely be trusted; they are, as it were, a class of judicial pupils composing a school for judges, constantly increasing their fund of judicial knowledge, acquiring that practice and experience most fitting, and qualifying them for judges of our state courts, and promotions to district or circuit judges of United States courts.

The opposing creditors, by their counsel, submit the following objections to the granting of the bankrupt's motion:

First, "There is no justification in law for the exercise of such power or discretion by the register at this stage of the proceedings."

Second. "The functions of the register have been performed with the exception of filing the specifications." (*General Orders* 6, 7, 12, 24 and 29.)

Third. "The case was *de jure* remanded to the court after the filing of the specifications."

Fourth. "The register has no jurisdiction in the premises. He is limited to granting amendments for omissions in the schedules, and leave to amend in uncontested cases." (*General Orders*, 5, 7 and 33.)

Fifth. "It is for the court, and the court alone, to decide upon motion for leave to amend in contested cases; the filing of specifications is decisive of the question whether a case is contested or not. The motion should have been addressed to the court."

Sixth. "The register has already certified that said petition and schedule are correct in form, as it was his bounden duty to do so, according to rules 4 and 7."

Seventh. "It is claimed by the opposing creditors in the specifications, that the matter sought to be amended or withdrawn is evidence of both fraud and perjury under the law."

In re Heller.

Upon a careful examination of the views presented by the counsel for the bankrupt, and also of the opposing creditors and the authorities cited, I do not find any which support either of the objections of the opposing creditor. The objection taken that the mere filing of the specifications deprives the bankrupt of his right to the amendments, is not, in my opinion, sustained by the bankrupt law, or by the rules or practice of this court, as the bankrupt act, by section 26 of the act, provides, "That the bankrupt shall be at liberty, from time to time, to amend and correct his schedules of creditors and property so that the same shall conform to the facts;" and for the purpose of such amendments the register is the court, and has the power to grant them, on motion, *ex parte*, and that any politeness or courtesy shown to counsel for creditors, out of personal respect by the register, who was willing that they should be heard in order that their views might be presented to the court, does not bring the cause within the rule of that portion of the bankrupt act defining contested cases, and that this application is *ex parte*, and not, in any respect, a contested case.

The mere filing of the specifications does not, *ipso facto*, adjourn the cause into court, or oust the register of his jurisdiction of the cause. The filing of the specifications is a mere incident to the opposition to the bankrupt's discharge, by a statement of the reasons why a bankrupt should not be discharged. He (the register) proceeds with the cause notwithstanding the specifications, until his duties are performed. *In re Puffer* (2 N. B. R., 17), HALL, J., decides that if the creditor desires an examination of the bankrupt, with a view of using such examination in opposing the discharge, or for any other purpose, he can proceed under district court rule 26 (northern district of New York), such proceedings retain the cause before the register until the testimony shall have been taken; any creditor having a standing in court has a right to have such examination of

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the bankrupt, or any other persons as witnesses. (*In re Adams*, 36 *How.*, 51.)

Creditors who have proven, or attempted to prove, their claims, although not as yet allowed by the register, are entitled to have an order for such an examination. (*B. R. Sup.* 43; 36 *How.*, 51; *Bump on Bankruptcy*, 64; *Bankrupt Act*, § 19; *General Order*, 3.)

1st. Upon all the proceedings in this cause, including the specifications, I decide as a matter of law, that this application of the bankrupt, in form of a motion to amend his schedules, is one that he has a right to make *ex parte*, and that neither the assignee nor opposing creditors have a right to be heard upon the motion or to oppose the same, but that it is better practice, in order to bring the question fully before the district court, to allow them to do so, and to require due notice of such application to be given.

2d. That the bankrupt has a right to amend his schedules by striking out the names of the eight persons who have become creditors of the bankrupt since the filing of the petition and schedules.

3d. That in this case it was the duty of the bankrupt to amend his schedules, so as to make them conform to the facts, and that he could make such application at any stage of the proceedings before the register had returned the cause to the court, and that the filing of the specifications did not prejudice him in, or deprive him of his right.

4th. That the register has the right to grant an order allowing such amendments whenever a proper cause therefor is shown. This being a proper cause, and the causes shown are in my opinion sufficient, the motion of the bankrupt is granted.

BENJAMIN TODD, *for bankrupt.*

HENRY MORRIS, *for opposing creditors.*

BLATCHFORD, J.—I concur in the views of the register stated in his conclusions.

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SUPREME COURT.

ZENOS DENTON, respdt., agt. JANE A. DENTON, appellt.

Section 135 of the Code forbids the court to allow a defendant, in an action of *divorce* commenced by service by *publication*, to come in and defend.

Where a judgment of divorce has been *regularly and fairly* obtained, it ought to be considered as final and conclusive, unless reversed on appeal.

But where such a judgment has been obtained by *fraud*, and especially where both parties to be affected by a vacatur of the judgment, have been parties to the fraud, the judgment should be set aside and the injured party permitted to defend herself against the charge of adultery, on which the judgment of divorce was obtained.

Where, as in this case, both the plaintiff and the woman he has married have conspired to impose upon the court, and have thereby obtained a judgment which would never have been ordered had the whole truth been disclosed, they cannot be permitted to enjoy the fruit of their unfair practices.

Every court of record, unless restrained by positive enactment, has the power to vacate its judgments when it is established that they were obtained by fraud.

If the provision of the Code sanctions such proceedings to obtain a judgment of divorce as was resorted to in this case, and binds the hands of the courts so that no relief can be afforded, the sooner such legislation is repealed the better for the peace and good order of society.

Fourth Judicial Department, General Term, March, 1871.

MULLIN, P. J., JOHNSON and TALCOTT, JJ.

APPEAL by defendant from judgment of special term.

The defendant made a motion at the special term, to set aside the judgment of divorce obtained against her in this action. The service of the summons and complaint were by publication; at the time of the service, she was a resident of the state of Wisconsin. The relief was sought on the ground that the judgment was obtained by fraud, practised by the plaintiff upon her, as well as upon the court. The motion was denied, and from that order she appeals.

G. W. DAGGETT, *for appellant.*

NOYES & HEDGES, *for respondent.*

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By the court, MULLIN, P. J.—The facts appearing in the motion papers are as follows, viz.:

In or about the year 1851, the parties were married in Livingston county in this state. They continued to reside there as husband and wife until the spring of 1865, when the plaintiff advised the defendant to take with her one of the children, and go and visit her relatives in Wisconsin; promising that in the fall he would take the other children with him and join her there, where he intended permanently to reside.

Plaintiff carried defendant and her child to a neighboring railroad station, purchased tickets for them to Milwaukee, gave her \$15 to pay the expenses of their journey, and put them on the cars, and they went, according to the understanding with the plaintiff, to defendant's relations in Wisconsin.

For about a year after defendant arrived at Rippon, where her relatives resided, she received, from time to time, letters from the plaintiff. She was then taken sick, and continued so for about a year. Her friends were poor; she received nothing from her husband; he ceased to write to her; and she was compelled to apply to the officers charged with the care of the poor, for assistance, and she was assisted by them. When she recovered her health she went to Illinois and worked as a house-servant, and when she had earned enough to pay her expenses back to this state, she returned thereto, to learn that her husband had obtained a divorce from her, by reason of her adultery committed before her removal from this state, and that he had married another woman with whom he was living. Of the proceedings to procure the divorce she had never heard until her return; and as soon thereafter as practicable she made the motion to set aside the judgment, and for leave to come in and defend the action.

She denies, in the most unequivocal terms, the adultery charged, and all the matters sworn to by the witnesses ex-

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amined on behalf of the plaintiff to prove the adultery, and there is no evidence on the part of the plaintiff that her statements are not true, except the proofs taken by the referee, on the reference to ascertain and report whether the matters charged in the complaint were true.

It would seem that the proceedings in the action were in conformity to the provisions of the Code, but the judgment was obtained by the grossest fraud and collusion, practised as well upon the defendant as upon the court.

The plaintiff was sworn and examined before the referee, and swore amongst other things, that the defendant had left him without his consent, and had gone to Wisconsin to reside. It appears, however, by the affidavit of the defendant and another witness, and by the plaintiff's confessions to others, that he had induced her to go west, under the assurance that he would join her with two of her children in the fall, and would then make that state his residence—that he furnished her the money to go with, aided and assisted her in going, and knew when she intended to go and where she intended to reside. This matter thus sworn to by the plaintiff, although false, was not material to the issue to be tried, but it shows the *animus* of the man, and the desperate means to which he was prepared to resort to accomplish his purpose.

It is impossible to read the defendant's story and not be satisfied that the plaintiff induced her to go west, in order that he might proceed against her as a non-resident and thus prevent her from interposing any defense to his action for a divorce.

The plaintiff's attorney made affidavit that he enclosed a copy of the summons and complaint in an envelope, and directed the same to the defendant at Rippon, in March, 1866, at which time, she resided there. These papers were never received by her, nor did she in any other manner learn of the commencement of the action against her.

The only witnesses called before the referee, to prove the

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adultery, were the plaintiff's brother, and one Isabella S. Wilkinson. The brother testified to no fact that would justify the finding of the commission of the adultery charged in the complaint.

Isabella is the witness who swears to the adultery. She testifies that on the 5th October, 1864, and before the defendant went west, she saw defendant and one Milton W. Seymour in the same bed one night at the house of said Seymour. He was a man of family at the time. She (the witness) was there at Seymour's, taking care of his children.

In April, 1864, and while plaintiff was sick at his fathers, the witness says she went to his (plaintiff's) house early in the morning, and defendant and one Keith came to the door which was locked. Defendant told him that she, (defendant) was afraid to stay in the house alone, and got Keith to stay with her. She also told witness, that she was going to leave her husband, that she could find a man that she thought more of than she did of him. This witness and plaintiff's brother also testified that Keith was a licentious man, and was in the habit of visiting defendant when plaintiff was from home, and that there were reports in circulation that defendant was not a woman of chastity.

Could the referee or the court that rendered the judgment of divorce, have supposed that this Isabella S. Wilkinson was the wife of Milton W. Seymour, at the time that she saw him and the defendant in bed together at his (Seymour's) house? Could they imagine that this Isabella, who swore that when this adultery was committed, was living at Seymour's, and taking care of his children, was at that very time Seymour's wife, and the mother of the children she was taking care of?

The order for publication was made the 19th March, 1866. On the 11th of that month, this Isabella wrote to defendant, a friendly letter, in which she informs him that she has got a divorce from her husband, Seymour—but not

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an allusion to any improper intimacy between defendant and him, but on the contrary, speaks of her very kindly and promises her her likeness as soon as obtained.

No court would have granted plaintiff a divorce on the testimony of this woman, if her history had been disclosed?

Her story as to the adultery, is incredible unless a freedom of intercourse between the sexes is tolerated in the community in which they lived, such as is permitted only among beasts or savages.

It is incredible that a wife would be a witness to adulterous intercourse between her husband and another woman, and not only remain silent about it, but carry on a friendly correspondence with the husband's paramour.

Good faith demanded that this woman should have disclosed to the referee and court, how she had been connected with the parties—that she had been divorced, and that the adultery was committed while she was living with Seymour as his wife, and not merely as the nurse of his children.

She was not bound to disclose that she was then engaged with the plaintiff in procuring a divorce for him, so that as soon as obtained she could marry him, as she did within a few days after the divorce was granted.

The defendant swears, and it is not denied, that the defendant furnished to Isabella the means to pay for obtaining a divorce from her husband.

It would be difficult to conceive of a more carefully planned or a more successfully executed piece of fraud and deception than the plaintiff and Isabella have planned and executed in this case, and it would be a disgrace to the courts and to our system of jurisprudence, if they furnished no remedy for such a wrong as has been done to the defendant.

The only answer to these matters sworn to by the defendant is, that § 135 of the Code, forbids the court to allow a defendant in an action of divorce, commenced by service

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by publication, to come in and defend. This action was commenced by publication, and is for divorce, and hence the case is brought within the very terms of the statute.

Where a judgment of divorce has been regularly and fairly obtained, it ought to be considered as final and conclusive unless reversed on appeal.

After such a judgment is obtained, an innocent person may intermarry with the one who has been relieved from the former marriage, and if it should be set aside, the intercourse legal when begun, would become adulterous and the children of the marriage bastardized.

But when such a judgment has been obtained by fraud, and especially when both the parties to be affected by a vacatur of the judgment have been parties to the fraud, the judgment should be set aside, and the injured party permitted to defend herself against the charge of adultery on which the judgment of divorce was obtained.

If the present wife of the plaintiff, had been free of all connection with the fraudulent means by which the divorce was obtained, a court would hesitate long before it deprived her of the protection the judgment afforded, if it could be induced even by reason of the fraud of the plaintiff to interfere with the judgment. But these considerations have no application to this case, both the plaintiff and the woman he has married have conspired to impose upon the court, and have thereby obtained a judgment which would never have been ordered had the whole truth been disclosed, and they cannot be permitted to enjoy the fruit of their unfair practices.

Every court of record, unless restrained by positive enactment, has the power to vacate its judgments when it is established that they were obtained by fraud. (*Hill agt. Northrup*, 9 *How.*, 525; *Denton agt. Noyes*, 6 *Johns.*, 296; *Lowber agt. The Mayor*, 26 *Barb.*, 262; *Johnson agt. Popplewell*, 2 *C. & J. (Exchg.)* 544; *Abbott agt. Richards*,

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15 *M. & W.*, 193; *Cash* agt. *Wells*, 20 *E. C. L.*, 523; *The People* agt. *The Mayor*, 19 *How.*, 289).

A court of chancery has power on bill filed to vacate a judgment of a court of law obtained by fraud. (*State of Michigan* agt. *Phoenix Bank*, 33 *N. Y.*, 9, and cases cited). Resort to a court of equity becoming necessary, because of the difficulty there formerly was in courts of law in trying questions of fact arising on motions, and particularly questions of fraud. And when discovery was necessary it was powerless to grant relief.

When, however, none of these difficulties presented themselves, the court granted relief on motion, and only turned the parties over to the expensive and tedious remedy of a suit in chancery, where it found itself unable to determine the questions of fact arising on the motion.

But now, courts of law are authorized to refer it to a referee to take proof on disputed questions of fact arising on motion, and in that way, to afford the parties an opportunity to ascertain the truth by the examination of the witnesses produced before such referee. On the coming in of the evidence thus taken, the court of law is as capable of passing upon the questions of fact as would be a judge sitting in equity.

There is not, therefore, ordinarily any necessity now for sending a party seeking to set aside a judgment for fraud in obtaining it, to a court of equity. There may, however, be cases in which that course may still be not only proper, but necessary.

It is said by the defendants counsel that before the adoption of section 135 of the Code, the court had no power to grant a judgment of divorce in an action commenced by publication; and as that power is given by the Code, the court possesses no power over the judgment except such as it permits, and as, by the same section, it is forbidden to let a defendant, in such action, in to defend, such relief cannot be granted.

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If the proposition of the counsel is limited to cases of judgments regularly and fairly obtained, I agree with him. But if he means to assert that the court has no power to set aside such a judgment when obtained by fraud, I cannot agree with him.

When the jurisdiction of a court is extended to a new subject, the court deals with that subject precisely as it does with other cases within its jurisdiction, unless expressly restrained, and it will regulate or set aside the proceedings therein in the same cases and subject to the same rules as are applied in other cases.

If the court has not power to set aside judgments in divorce cases, on motion, when obtained by fraud, the most mischievous consequences must follow. The highest possible inducement would be held out to husbands tired of their wives, or wives tired of their husbands, to resort to fraud and perjury in order to effect a release from a connection that has ceased to be agreeable.

If the provision of the Code sanctions such proceedings, and binds the hands of the courts so that no relief can be afforded, the sooner such legislation is repealed the better for the peace and good order of society:

If a defendant in an action of divorce cannot be let in to defend, on motion, because of the injustice that may be done to persons who may have married upon the faith of the validity of the judgment, the same considerations forbid a resort to a court of equity to vacate the judgment. A court of equity might have power to grant the relief prayed for, but if the effect upon innocent third persons is to control, it would be constrained to refuse to interfere with the judgment, and thus fraud and unfair practice would triumph, while the injured party, the one against whom the charge of adultery was made, and who—without an opportunity to be heard—has been convicted of it, is turned out of court with an infamous offense indelibly fastened upon

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her by the judgment of a court of justice, and all who are connected with her compelled to share in her disgrace.

It is much better that the court in which the judgment is entered should grant the defendant relief, afford the plaintiff an opportunity to establish, if he can, the dishonor of his wife, so that, if established, he may safely and honorably renew any engagements into which he may have entered, relying on the validity of the judgment.

If he has obtained it by unfair practices, he has no claim to the favor of the court, he is entitled to nothing beyond the most rigid application of the rules of law. If he has induced an innocent woman to marry him, in the belief that he was legally competent to enter into such a contract, it is better that she should suffer the inconvenience of having the marriage dissolved than that the innocent wife should be forever disgraced through the fraud and perjury of the husband, or of those conspiring with him to effect her ruin.

There is no conflict of evidence in this case. Defendant's affidavits are not contradicted. The question is, therefore, one of power, and of the existence of the power, and of the duty of the court to exercise it I entertain no doubt.

The judgment must be set aside, and defendant let in to defend.

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SUPREME COURT.

JAMES W. TODD agt. EDWARD LAMB DEN.

A party to an action may be compelled to attend for his *examination* before a judge, as a witness, under section 391 of the Code, in whatever county he is served with a summons and notice to attend for such examination, although he be a resident of another county. (It seems that this section of the Code should be amended in this respect, as it may operate oppressively and prejudicially to the party to be examined in many cases.)

New York Special Term, Nov. 1870.

THE defendant, a resident of New Rochelle, was served in the city of New York, on November 16, 1870, with an affidavit, summons and notice to attend for his examination before trial, under section 391 of the Code of Procedure, before one of the judges of the supreme court, at the court house in the city of New York.

On the return day of the summons, the defendant raised the objection that a party could not be compelled to attend for his examination in any other county than that of his residence, and thereupon moved to vacate the summons and notice.

CHARLES H. ROOSEVELT, *for the motion.*

EDWARD S. CLINCH, *opposed.*

BRADY, J.—Section 391 provides that a party to be examined shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance. I entertain the opinion that the latter alternative was not designed to authorize the examination of a party only temporarily out of his county,

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but was intended to apply to persons who do business in some county other than that of their residence. The language of the section does not admit, however, of such a construction, and leaves no doubt of the right, in terms, to examine a party wherever he may be served with a summons. He may be called to another county, far distant from his home, by some emergency, and be there served with a summons requiring him to submit to an examination in the absence of his counsel and advisers. I think such a proceeding may always operate with prejudice, and should be corrected either by legislation or rule.

The defendant must appear on the 28th of November, at 10, to be examined. Notice to be given him by the plaintiff's attorney, on or before the 27th November.

Schneider agt. Hobein.

N. Y. COMMON PLEAS.

HENRY SCHNEIDER agt. AUGUST HOBEIN, and others.

Under the *mechanic's lien laws*, (*Laws 1851, and 1863*), of the city of New York, where the owner makes a voluntary payment in good faith to the contractor, before the lien of a sub-contractor is filed, it is a good payment as against the sub-contractor, although by the terms of the contract the amount was not then due the sub-contractor and did not become due until after the time when the lien notice was filed.

But no voluntary payment made by the owner to the contractor after the sub-contractor, or workman, has filed his notice to lien, can in any wise affect or impair the lien of the latter.

General Term, January, 1871.

Before DALY, Ch. J., LOEW, and LARREMORE, JJ.

APPEAL from a judgment entered upon the report of a referee.

This action was brought by the plaintiff, a sub-contractor street, in the city of New York, of which the defendant, to foreclose, a mechanic's lien on premises in East 55th Hobein was the owner.

It seems that the contractors, Kiechler and Huppert (the other two defendants) were to receive from the defendant Hobein, the sum of \$4,100 for erecting the building in question.

Said sum was to be paid by installments, the last payment of \$1,600, to be made on the completion of the building.

The plaintiff, at the request of the contractors, furnished materials for the erection of said building, amounting in the aggregate to the sum of \$735.

David McAdam, Esq., the referee to whom the cause was referred, found as matter of fact that sometime before

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the completion of the building, and before the plaintiff filed his notice of lien, the defendant, Hobein paid the contractors in advance on account of the last payment the sum of \$600, and that subsequently at the request of the latter, he paid to Husted, Dunbar & Co., who had also furnished materials for said building, and whose notice of lien was filed prior to that of the plaintiff, the remaining \$1,000 in full satisfaction of their lien.

The referee further found as matter of law, that the payment by the owner to Husted, Dunbar & Co., of said sum of \$1,000, was a valid payment as against the plaintiff, but that the payment of \$600 he made to the contractors, was not a good payment as against the plaintiff, so as to defeat the lien which the latter had filed before the said sum became due according to the terms of the contract.

He accordingly, ordered among other things, that the plaintiff have judgment, directing a sale of the premises, and that out of the proceeds he be paid the aforesaid sum of \$600, with costs.

The defendant, Hobein appealed.

FLANAGAN and GROSS, *for owner, appellant.*

A. C. ANDERSON, *for claimant, respondent.*

By the court, LOEW, J.—Under the lien law of 1851, this court uniformly held that in order to entitle a sub-contractor or material man to a judgment against the owner as provided by said act, he must show either that at the time of the creation of the lien, by the filing of the notice, a debt was actually owing from the owner to the contractor upon the contract, or else that the same subsequently became due and owing. (*Smith agt. Coe*, 2 *Hilt.*, 365; *Ferguson*, agt. *Burk*, 4 *E. D. Smith*, 760; *Lynch agt. Cashman*, 3 *Id.*, 660; *Sullivan agt. Brewster*, 1 *Id.*, 682).

In our opinion, the act of 1863, (*Laws of 1863, chap.*, 500,) has not changed the law in this respect.

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The clause in the third section of the last mentioned act which provides that, "no payment voluntarily made shall impair the lien of any person, except the one to the person so paid," and which is relied on to sustain this judgment we apprehend, was not intended to include or cover a case like the one at bar.

True, standing alone by itself, the clause referred to may appear broad enough to comprehend a case like this; but if it be read in connection with the preceeding part of the same sentence, it will, we think, become apparent that all the legislature intended to do, was simply to protect lienors in cases where several lien notices are filed for the same demand, as for instance, where the lien of the contractor includes the claim of a sub-contractor or workman to whom he is indebted, and who has filed a separate lien.

In the case put, it is clear that no voluntary payment made by the owner to the contractor after the sub-contractor or workman has filed his notice of lien, could in anywise affect or impair the lien of the latter.

But in the case under consideration, the owner made the payment to the contractors, which the referee decided was not good as against the sub-contractor, a full month before the latter filed his lien; and although by the terms of the contract, it was not then due, and in fact, did not become due until after the time when the lien notice was filed, still it having been made in good faith, the same was in our opinion, a good and valid payment as against the sub-contractor as well as the contractor.

Any other construction of the act would preclude the owner and contractor from in anywise altering, changing or modifying their contract, without making the former liable to the sub-contractors and workmen, upon and in conformity with the terms of the original agreement.

The lien law subrogates the person who has furnished material to, or worked under the contractor, and filed the necessary notice *pro tanto*, to the rights of the contractor,

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under the contract, but unless in case of fraud, collusion or intent to evade the act, he can have no other or greater rights, and if before he has filed his lien a *bona fide* payment be made by the owner to the contractor, the same must, it seems to us, be held good as against him, as well under the act of 1863, as that of 1851. (See *Lynch* agt. *Cashman*, *supra*.)

In addition, it may be said, that a sub-contractor or material man like the plaintiff, can easily protect himself against loss, by going to the owner and inquiring of him the particulars in regard to the contract, and the money due and to become due upon the same, before he furnishes the materials.

But instead of doing this, it appears from the plaintiff's own testimony, that he never saw, or conversed with the owner in regard to the matter, until the day before he filed his lien, which was after he had furnished all the materials in question, and as before stated, one month after the owner had made the payment to the contractor.

It is not even claimed that the plaintiff ever saw the original contract, made between the owner and the contractor, or that he knew that, by the terms thereof the last payment would not be due until the completion of the building, and that he furnished the materials relying on that fact.

It follows from what has been said, that the referee erred in deciding that the payment referred to was invalid as against the plaintiff.

But it appears from the testimony given on the trial by the owner himself, that after the plaintiff had filed his lien he paid the contractors \$140, for extra work.

Now, the building contract provided, that the owner should be at liberty at any time during the progress of the work, to request any alteration, deviation, addition, &c., from said contract he might desire, and the fair and reasona-

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ble value thereof should be added to or deducted from the amount of the contract, as the case might be.

This last payment was, therefore, clearly invalid as against the plaintiff.

The judgment should be reversed, and a new trial ordered, unless the plaintiff shall consent that it be reduced to \$140, in which case it is affirmed for that amount, with costs of suit.

DALY, *Ch. J.*—I agree in the conclusions arrived at by Judge LOEW.

The respondent in support of the referees finding, has referred us to *Meehan agt. Williams*, (2 *Daly*, 367,) but that case did not present the point which is to be decided in this case. The action there was brought by the contractor, with the owner to foreclose the lien which the plaintiff had upon the building. His sub-contractors were parties to the action, and having also liens upon the building, we simply held that they were prior in point of equity to the lien of the plaintiff, which we could do in that action having all the parties before us, and the power to render a personal judgment against the contractor with the owner.

Phelps agt. Baker.

SUPREME COURT.

SARAH PHELPS agt. MARCUS BAKER.

No principle of law is better settled than that a *judgment* rendered without the court that renders it having obtained *jurisdiction* of the subject matter to which it relates, and of the persons to be bound thereby, is *utterly void*.

This principle of law applied in this case, where a judgment in favor of the plaintiff for *alimony* obtained in the state of Ohio, against the defendant, who had never resided in that State, nor appeared in the action, nor been served with process, except by *publication in a newspaper*, which notice never came to defendant's knowledge until after the rendition of the judgment, and the sale of his property by virtue of an attachment issued under it in this state.

The judgment of the county court in Ohio is void in this state, as to the alimony, whatever its effect may be upon the marriage.

There is no doubt of the power of the court to set aside the judgment, upon motion, where it clearly appears that the plaintiff had no legal cause of action.

Posting citations in public places within the jurisdiction of the court in which proceedings to obtain judgment are instituted, can confer no legitimate jurisdiction over foreigners who are non-residents, and do not appear to answer the suit, whether they have notice of the suit or not. The effect of such proceedings are purely local, and elsewhere they will be held to be mere nullities.

Service by publication is valid within the jurisdiction by whose laws it is authorized, but of no validity beyond it.

It has been repeatedly held that where the suit is commenced by the *attachment of property*, that the judgment record therein is valid, so far as the title to the property attached is concerned, but utterly inoperative as to the defendant for any other purpose, who has not appeared or been personally served with process.

Fourth Judicial Department, General Term, Sept., 1870.

Before MULLIN, P. J., JOHNSON and TALCOTT, JJ.

APPEAL from decision of special term.

By the court, MULLIN, P. J.—In June, 1847, the plaintiff, whose maiden name was Sarah Demming, intermarried with the defendant in Monroe county in this state. They cohabited together until some time in the year 1853, when the defendant went to the Island of Australia, to better his fortune, leaving his wife with his parents in this state. In

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1857 the plaintiff left the county of Monroe and went to live in Ohio. In 1858 she presented a petition to the county court of Cuyahoga, in said state, setting forth, among other things, her marriage with defendant, his desertion of her, and the commission of adultery by him in this state in 1852, and praying a divorce and alimony. A notice of the presentation of such petition and that the defendant was required to appear and answer thereto at the then next term of said court, was published in a newspaper printed in said county, for six successive weeks. Such publication was, by the laws of Ohio, equivalent to service on the defendant.

The defendant did not appear—was never a resident in Ohio—never saw or heard of said notice, nor did he hear of said action until in 1868, when he was informed by his friends that plaintiff had obtained a decree of divorce. Such proceedings were had in said action that a decree of divorce was granted, whereby the said marriage was dissolved, and \$1,000 allowed to plaintiff for alimony, and the sum of \$14 88 for the costs of the action.

In January, 1868, the plaintiff commenced an action in this court upon the aforesaid judgment, to recover the alimony awarded to her. On an affidavit of defendant's non-residence, an order for publication of the summons, and an attachment against defendant's property was obtained. Proof was subsequently made of the publication of the summons, and an application made to the court at a special term for judgment for the said alimony and interest thereon. A duly authenticated copy of the judgment of the Cuyahoga county court was presented to this court, and the same was received as sufficient evidence of the liability of defendant to pay the said sum of \$1,000 and interest, and judgment was entered in favor of the plaintiff and against the defendant for said alimony and interest thereon.

The plaintiff caused the interest of defendant in certain real estate in Monroe county to be levied on, by virtue of

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the attachment obtained by her, and after the recovery of the judgment in this court such interest of defendant in said real estate was sold by virtue of an execution issued to enforce said judgment, and the sum of \$400 was obtained therefor.

Upon affidavits and papers establishing the foregoing facts, the defendant moved at special term to set aside said judgment, because the Ohio judgment was utterly void, and could not be the basis of a recovery in an action, and because of sundry jurisdictional defects and irregularities in the proceedings in the action in this court.

The motion was granted, and from that order, the plaintiff appeals to this court.

It should be stated, that after obtaining the divorce, the plaintiff married one Phelps, with whom she now lives as his wife.

It is not necessary to a decision of this appeal, that we should inquire whether on the facts appearing before us, the county court of Cuyahoga county in the state of Ohio, could annul a marriage solemnized in this state, so as to make its judgment valid and binding in this state.

The court of appeals has settled that question, if it could be said to be an open one in this state, in *Kerr* agt. *Kerr*, (41 N. Y., 272,) by holding that such divorces are utterly void.

The question now to be considered is, whether a judgment in favor of the plaintiff for alimony is valid for any purpose against the defendant who had never resided in the state of Ohio, nor appeared in the action, nor been served with process, except by publication in a newspaper, which notice never came to his knowledge until after the rendition of the judgment and the sale of his property by virtue thereof.

No principle of law is better settled than that a judgment rendered without the court that renders it having obtained

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jurisdiction of the subject matter to which it relates, and of the persons to be bound thereby, is utterly void.

If there is any exception to the rule, it is to be found in cases in which the proceedings are *in rem*, and where, from the necessity of the case it is exceedingly difficult if not impossible to discover the parties owning or interested in the property, and when delay for the purpose of bringing them into court would result in the destruction of the property or in a total failure of justice.

It is found to be necessary for governments to provide for the institution of actions against non-resident citizens, against non-resident foreigners, by a citation *vico et modis*, as it is called, or by an attachment of their property nominal or real, within their own territorial sovereignty, and to proceed to judgment against the party defendant whether he has any actual notice of the suit or not, or whether he ever appears in the suit or not. There is however, no pretence to say, posting citations in public places within the jurisdiction of the court in which such proceedings are instituted, can confer any legitimate jurisdiction over foreigners who are non-residents, and do not appear to answer the suit whether they have notice of the suit or not. The effects of such proceedings are purely local, and elsewhere they will be held to be mere nulities. (*Story on Conflict of Laws*, § 546).

As early as 1808, it was held in the King's Bench in *Buchanan agt. Rucker*, (9 *East*, 192,) that an action would not lie in England, on a judgment recovered in the Island of Tobago, against the defendant, a resident of London, where the service was in conformity with the laws of the Island, by nailing a copy of the declaration at the court house door. The judgment was held to be a mere nully.

It has been repeatedly held that where the suit is commenced by the attachment of property, that the judgment recovered therein is valid, so far as the title to the property attached is concerned, but utterly inopoperative as to the

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defendant for any other purpose, who has not appeared or been personally served with process.

Service by publication is valid within the jurisdiction by whose laws it is authorized, but of no validity beyond it.

This very point was decided in *Borden agt. Fitch*, (15 *Johns.*, 121). The action was for seducing plaintiff's servant. The defense was, that the person seduced was defendant's wife. Defendant's marriage to one Sellick was proved, and a judgment in Vermont annulling that marriage. But no proof of actual notice to the wife—that judgment was held to be void, and the divorce inoperative.

The same conclusion was arrived at in the case of *Vischer agt. Vischer*, (12 *Barb.*, 640). The action for the divorce was commenced in Michigan, by publication. *Bradshaw agt. Heath*, (13 *Wend.*, 407).

It is, however, unnecessary to multiply authorities on a proposition that is now elementary in the law.

The judgment of the county court is void in this state as to the alimony, whatever its effect may be upon the marriage.

I have no doubt of the power of the court to set aside the judgment upon motion where it clearly appears that the plaintiff had no legal cause of action. (*Titus agt. Relyea*, 16 *How.*, 373).

It was insisted by the counsel for the appellant, that the judgment dissolving the marriage, and granting alimony, must be held to be valid under that provision of the constitution of the United States, which declares that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, (*Art. 4, § 1, of the Constitution*), although jurisdiction may not have been obtained as would be required to give validity to the judgment of the courts of a foreign country.

The courts of Massachusetts and Connecticut, have held that this provision of the constitution applies only to judgments of the courts of any of the United States, where both

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parties are within its jurisdiction when the suit was commenced where the defendant was served with process, and had or might have had a fair trial of the cause. This construction of the constitution was approved in *Bradshaw agt. Heath*, (13 *Wend.*, 407,) and in other cases.

Any other construction would lead to the greatest injustice, and we are not at this late day prepared to adopt a new and mischievous construction, if it should be more in accordance with the letter of the constitution.

The proceedings in this action are irregular, and would justify us in setting them aside, but for the invalidity of the judgment according the plaintiff alimony, the whole proceedings must be annulled.

The order of the special term reversed, and the following order is directed to be entered. The defendant is permitted to come in and defend; the judgment and proceedings thereunder to stand; but all proceedings thereon stayed until the further order of this court. The answer of the defendant to be served in twenty days after service of a copy of this order. The costs of the appeal \$10, and of the motion, to abide the event.

JOHNSON, J., concurs in the result.

 Schacttler agt. Gardiner.

47 *sent dismissed* *ny. 11/1/07*

N. Y. COMMON PLEAS.

FERDINAND SCHACTTLER, appellant agt. THOMAS GARDINER,
respondent.

The effect of the *ceasing of the lien* for want of an order renewing it, under § 10 of the *Mechanic's lien law*, (Ch., 500, *Laws*, 1863,) is to destroy all recourse of the lienor to the particular property described in the lien. The proceeding to foreclose, so far as the owner of the property is concerned (if he be not personally liable to the lienor for the debt) it is at an end, and the proceeding should be dismissed as to him.

But as between the lienor and the contractor, who, is personally liable to him, the ceasing of the lien does not affect the proceedings, if the issue joined and the judgment claimed by the lienor. depend, not upon the lien, but the merits of the claim upon which it was founded, if the court have jurisdiction of the proceeding.

Where the court acquires, under the act, full jurisdiction of the parties and of the controversy between them, before the lien ceases, the judgment rendered is *regular*.

And where such judgment is against the lienor, it would not be fair to permit him on motion, to avoid the effect of it on the merits, after a full and protracted trial, in a tribunal of his own choosing.

It would seem to be proper to dismiss the proceedings as to the *owner*, after the lien has been removed by the deposit of the amount of the lien with the county clerk, by the contractor under the act; the lienor then having no rights against the owner but is left to the funds in the clerk's hands for the satisfaction of his lien.

Rule 32 (old) does not apply to a *reference* "of the issues" in a lien proceeding, and the *exceptions* are not to be heard first at special term.

General Term, March, 1871.

Before LARREMORE, and DALY, JJ.

APPEAL from an order of this court made at special term denying plaintiff's motion to vacate or modify a judgment on the merits, entered in favor of the defendant.

This was a proceeding under the judgment lien law of 1863, relating to the city of New York. The lien was filed May 6, 1868, by the plaintiff, a sub-contractor against the contractor and Wm. H. Vanderbilt the owner, for work and materials furnished in the erection of No. 459 Fifth Avenue.

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The Claim was for \$4,068 67, and interest from April 20, 1868. The lien notice was filed in time.

The proceeding was commenced by the lienor serving the notice to foreclose, required by section 5 of the act, upon the contractor, and the owner on May 29, 1868. The notice was returnable June 15, 1868.

On the return day the lienor, the contractor and the owner all appeared by attorney in this court, in response to the notice, and an order was made according to the practice of this court, requiring the issues between the parties to be joined by the plaintiff, (lienor) serving his complaint and bill of particulars within twenty days on the attorneys of the defendants (contractor and owner,) and by the defendants serving their answers thereto in twenty days thereafter.

The plaintiff served his complaint alleging that Vanderbilt was the owner of the premises, and had made a contract with Gardiner for the carpenter work and materials in the building; that by agreement between Gardiner and the plaintiff, the latter performed work and labor, and services, and furnished materials, in conformity with the said contract, in the erection of the building, for said Gardiner, for which Gardiner remained indebted to plaintiff in the sum of \$4,008 67, and that there was then due from the owner to the contractor more than sufficient to pay said sum. The defendant demanded judgment: I. Directing a sale of the owner's interest, &c.; and, II. Personal judgment against Gardiner, the contractor.

The defendant, Gardiner answered, denying, among other things, that he was indebted in any sum to the plaintiff; averred payment in full; and setting forth that he had deposited with the county clerk under section 8 of the lien act of 1863, the full amount of the lien, and costs, and had it removed. The owner did not answer, and on November 27, 1868, the proceeding was dismissed as to him on account of the deposit made as aforesaid.

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On November 27, 1868, the issues between the plaintiff and Gardiner, the then sole defendant were referred by consent to P. T. RUGGLES, Esq., to hear and determine the same.

The lien expired May 6, 1869, (being one year after its filing) and was not renewed as provided by the section of the act. The proceeding, nevertheless, was continued, and on May 30, 1870, the referee reported in favor of defendant, finding that the plaintiff had been paid in full by the defendant, Gardiner, and that the defendant was entitled to judgment dismissing the complaint, with costs.

The plaintiff excepted to the referee's findings; the report was confirmed by this court, June 28, 1870, and judgment for costs entered in favor of defendant.

On October 1, 1870, plaintiff moved to vacate the judgment, or to modify the same so as to make it simply a judgment dismissing the lien with costs. and not a judgment against him on the merits of his claim, on which the lien was filed. His grounds were: I. That all proceedings were void after the lien ceased on May 6, 1869. II. That all proceedings were irregular after the unauthorized dismissal of the proceedings as to the owner, Vanderbilt, on Nov. 27, 1868. III. That the judgment was irregularly entered before argument of the exceptions to the referee's report. The motion was denied, whereupon this appeal was taken.

THEO. F. SANXAY, *for appellant.*

ALFRED ROE, *for respondent.*

By the court, JOSEPH F. DALY, J.—The effect of the ceasing of the lien for want of an order renewing it, under sec. 10 of the Mechanic's Lien Law, chap. 500, Laws of 1863, is to destroy all recourse of the lienor to the particular property described in the lien. This has been settled in this court. The proceeding, so far as the owner of the property is concerned (if he be not personally liable to the

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lienor for the debt), is at an end and the proceeding should be dismissed as to him.

But as between the lienor and the contractor, personally liable to him, the ceasing of the lien does not affect the proceedings, if the issue joined and the judgment claimed by the lienor, depend, not upon the lien but the merits of the claim upon which it was founded, if the court have jurisdiction of the proceeding.

The plaintiff cited the defendant to appear in this court by personal service of the notice required by the lien law. Pursuant to such notice the defendant appeared. Pleadings were served, joining issue upon the merits of the claim. That issue was indispensable in the proceedings to enforce the lien against the building, even if it were not made indispensable by the plaintiff's demand for personal judgment against the contractor. By the service of such notice, by the appearance of the parties in court, submitting to its order, and pleading, all which took place before the lien ceased by the expiration of the year, and all which proceedings were had under express authority of the lien law (§§), the court acquired full jurisdiction of the controversy between the parties. Jurisdiction having been acquired, the judgment rendered was regular. This view has been held in the court of appeals (*Maltby* agt. *Green*, 1 *Keyes*, 548), a proceeding under the Erie county mechanic's lien act (*chap. 305, Laws of 1844*); and a decision arriving at the same result has been made in this court at special term (*Barton* agt. *Herman*, 8 *Abb., N. S.*, 399). This view is perfectly consonant with justice. It would not be fair to permit the plaintiff to avoid the effect of a judgment against him upon the merits, after a full and protracted trial of issues raised by him, necessary to his demand, in a proceeding of his own commencing, and in a tribunal of his own choosing.

As to the second point, it would seem to be proper to dismiss the proceedings as to the owner after the lien had

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been removed by the deposit of the amount with the county clerk by the contractor under the act. The owner had no possible interest after that in the proceedings, and the lienor had no rights against the owner, but was left to the funds in the clerk's hands for the satisfaction of his lien.

Upon the third point: my view is that Rule 32 (now Rule) does not apply to a reference "of the issues" in a lien proceeding and that the exceptions are not to be heard first at special term.

The order of special term appealed from should be affirmed.

Lansing agt. Lansing.

SUPREME COURT.

JANE E. LANSING agt. CHRISTOPHER B. LANSING.

An attachment may lawfully issue against a defendant for the non-payment of alimony; and under it he may be committed to close confinement in jail.

Where it appeared that the defendant, for a year and a half after the decree against him for alimony and for costs, in an action for divorce—amounting to some \$400, had not paid any part thereof, nor had he apparently, made any effort to earn money to make such payment, but had lived with and been supported by his father:

Held, on a motion and affidavits for his discharge on the ground of his *inability* to pay, that the facts stated on the motion did not warrant his discharge as he did not show why he had not made any effort to earn money to pay the sums required by the decree; but rather that it appeared that he wilfully intended to avoid such payment, although he swore to his inability to pay.

Albany Special Term, April, 1871.

MOTION to discharge defendant from imprisonment.

F. B. MITCHELL, *for defendant, for the motion.*

J. H. CLUTE, *for plaintiff, opposed.*

LEARNED, J.—This is an action for divorce in which a decree was granted, September, 1869, in favor of the plaintiff. By that decree the defendant was ordered to pay the plaintiff \$200 annually in quarterly payments, from April 1st, 1869, and also to pay \$200 dollars costs, all of which defendant has neglected or refused to pay. An attachment was issued thereupon, returnable at the March special term, 1871, under which the defendant was required to show cause why he should not be punished for his refusal to pay. At that term, the defendant was brought into court and no cause being shown for his refusal, the court ordered the defendant to be committed to the custody of the sheriff of Schenectady county. In pursuance of that order, he was

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so committed to close custody. He now moves for an order discharging him, on two grounds: 1. That the court had no authority to commit him in such a case. 2. That the defendant is unable to pay, and ought, therefore, to be discharged.

On the argument of the motion, I mentioned to the defendant's counsel, that the second ground above stated ought to have been shown in opposition to the order for commitment, but was informed that the justice holding the court had then stated, that the proper course was to make this motion, and I, therefore, am at liberty to consider that ground. The court in granting a decree of divorce at the suit of the wife, is authorized to make a decree or order compelling the defendant to provide such suitable allowance to her for her support as the court may deem just, having regard to the circumstances of the parties, respectively. (2 *R. S.*, *m. p.*, 145, *Sec.*, 58). This order or decree, the court may enforce by sequestration. (2 *R. S. m. p.*, 148, *Sec.*, 74). The counsel for the defendant claims that this authority to sequester the defendant's estate, is substantially an authority to issue execution against property. But sequestration in the court of chancery was not in the nature of an execution against property. It was a process which issued where a party was in contempt; for instance, where the officer of the court has returned "*non est inventus*," or a "rescue" or "that he had been resisted in the discharge of his duty." (1 *Barb. Chan. Prac.*, 67). Its object was to compel obedience to the orders of the court, and it issued sometimes when the party was in custody for contempt and persisted in his contempt. It did not require the collection of any definite amount, but commanded the sequestration to take all the personal property and all the rents and profits of the real estate. (2 *Barb. Ch. Pr.*, 382). It is not necessary to cite cases on this subject, it is sufficient to refer to the above mentioned book of practice where the meaning of the word, and the cases in which this proceeding were

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had are explained. In these days, the process is somewhat antiquated as it is not mentioned in the Code. But it had, and still has a distinct meaning, and it was and is a process intended to punish for contempt, and not simply to collect a debt.

The counsel for the defendant refers to part 3, chap. 18, title 3, of the Revised Statutes, on proceedings as for contempt. By section 1, courts of record may punish in several cases clasified under eight subdivisions. The counsel urges that this case comes under subdivision 3, being for the non-payment of a sum of money, and that an attachment cannot issue, because an execution can be awarded. But it has already been shown that sequestration is not an execution for the collection of a sum of money, but is a process of punishment for contempt, so that it is not apparent from the provisions relative to divorce, cited by the counsel, that an execution for alimony can be awarded; and again subdivision 8 of the same section, retains attachments and proceedings for contempt as they have been usually adopted and practiced. When in a decree for a divorce the court awards alimony, the court decides that in the circumstances of the parties, respectively, it is the duty and in the power of the defendant to pay to the plaintiff the amount allowed for her support. As it was his duty to support her while she remained his undivorced wife, so it continues to be his duty now that, for his fault, she has been relieved from her marriage duties. His failure to do this is a violation of duty, and a contempt of court, unless excused by inability. The amount is settled by the court upon a consideration of the ability of the defendant to pay it. This is not the case of a debt which a defendant owes whether or not he has the means of paying. But on the basis, partly of the defendant's property and partly of his ability to earn money, the court decides that he can pay, and ought to pay so much towards the support of the woman whom he has wronged.

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The action for divorce is not an action on contract as was claimed by defendant's counsel. It is rather an action based upon a great wrong alleged to have been committed by the defendant, a wrong so great that for this and for no other the laws of God and the laws of this state permit the marriage relation to be dissolved. I think, for these reasons, that the attachment was lawfully issued for non-payment of alimony. Ought the defendant to be released from imprisonment on the ground of his inability to pay? This the court may do, perhaps, by its inherent power, and at any rate under section 20 of the last named title. The decree was granted September 14, 1869. The defendant says, he has had no means to pay since that time, and has had nothing since then but his wearing apparel. His father says, that the defendant has lived with him for the last eight years, that he has no means of support except the father furnishes them.

It appears, however, by the papers, that negotiations have been pending for the settlement of this alimony, at a sum in gross, for which the defendant's father proposed to become security. But a part of the terms of settlement were to be that the decree should be modified so that the defendant might marry again, this of course, was found to be impossible and the settlement fell through. The defendant does not explain in his affidavit why for the year and a half since the decree, he has earned nothing. He has lived with his father, and his labor must have been worth something. It is not shown that he is a man of feeble or infirm health, and I do not understand why he has not been able to earn \$200 per year, and pay the amount to his wife.

It may be that he has not real or personal property, except his clothing, but why has he none, has he been idle since the decree? If not, where are his earnings? If he had no property when the decree was granted, then it was his duty to try to earn something, he had no right to

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lay idle, and because he could live at his father's house, therefore, to refuse to work and to support his wife. From all the circumstances appearing in the affidavits, I am forced to believe, that the defendant willfully intends to avoid payment, and that if he had endeavored to comply with the decree of the court, he could have done so, and that, too, without any extraordinary effort. I observe that the defendant on his oath, states that he was not guilty of the offense for which the decree was granted. So far as this suit is concerned, that question is settled, whether rightfully or wrongfully, I do not know, but it is settled; if the defendant is innocent, he has the consolation of a good conscience, and the hope that some day his innocence may appear.

But it is no use now, nor does it tend to show his innocence, that he should attempt to thwart the decree of the court. He should rather make a sincere and earnest effort to comply with the decree, and if as he says, he has been wrongfully accused, he should bear the evil hoping that time may correct the mistake.

I shall deny the motion of the defendant, without costs, but this will be without prejudice, to his renewing at any time his application to be relieved from the confinement on account of his inability to pay the alimony.*

* It seems, therefore, that the motion is denied, not on the ground of the defendant's *inability* to pay, but upon the ground that he has not shown to the court *why* he has been unable to pay. Suppose that hereafter the defendant renews his motion, under the leave given, to be discharged on the ground of his inability to pay, and states in detail to the court all the reasons and circumstances minutely why he has not made sufficient efforts to earn money to pay the amount for which he is imprisoned, and also swears that he is still unable to pay, will he not be met by the decision of this motion as *res adjudicata* upon the question of his discharge, as he swore on the present motion positively his *inability* to pay, which must be supposed to be the basis for the motion and the only legal essential fact to be stated. While in jail, of course he could not earn any means to liquidate indebtedness. The facts and circumstances in reference to the reason why he had not earned money, &c., during the year and a half, might be interesting as a matter of history perhaps, but would not change or alter the essential fact of his inability to pay; and this fact must be supposed to have been passed upon by the court on the decision of this motion. (REP.)

Hughes agt. Mercantile Mut. Ins. Co.

NEW YORK COMMON PLEAS.

JOHN HUGHES agt. THE MERCANTILE MUTUAL INSURANCE
COMPANY.

An order of the special term, denying a motion to strike out certain allegations of the complaint as *irrelevant*, is *not appealable* to the general term.

General Term, January, 1871.

Before ROBINSON, LOEW and LARREMORE, JJ.

APPEAL from an order made at special term. The facts sufficiently appear in the opinion of the court.

SCUDDER & CARTER, *for defendants and appellants.*

R. P. LEE, *for plaintiff and respondent.*

By the court, LOEW, J.—This action was brought to recover the sum of \$5,000, upon a policy of marine insurance. The defendant made a motion, at special term, to strike out certain allegations contained in the complaint as irrelevant.

The motion was denied, and the defendant thereupon brought this appeal. If the order of the special term in this case can be reviewed at all, it must be under subd. 3 of sec. 349 of the Code, which provides that an appeal may be taken to the general term from an order, "When it involves the merits of the action, or some part thereof, or affects a substantial right." It seems clear that the order appealed from does not involve the merits of the action, or some part thereof, especially as the only ground upon which the defendant asks that the matters complained of should be stricken out, is their irrelevancy. Nor can it be

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said that the order affects a substantial right of the defendant, within the meaning of the Code, as the denial of the motion lay entirely in the discretion of the judge at special term (*Field agt. Steward*, 8 *Abb.*, N. S., 193).

Having come to the conclusion that the order in question is not appealable, and cannot therefore be reviewed by us, it will be unnecessary to consider whether the matter sought to be stricken out was irrelevant or not.

The appeal should be dismissed with costs.

ROBINSON and LARREMORE, JJ., concurred.

Matter of Gardner.

SUPREME COURT.

MATTER of appeal of HIRAM GARDNER from the assessment for the grading of Scovell Street, in the city of Lockport, and from the order confirming the same.

By the charter of the city of Lockport, the assessment for grading a street in that city is to be equally made upon the real estate deemed benefitted by the improvement, and to be estimated and determined by *one* of the assessors of the city, &c. *Held*, no objection that the assessment was made and reported to the common council by *two* of the assessors of the city.

Where the assessors, on examining the premises to be assessed, decide that the benefit to be derived from the improvement would be alike and equal to each lot, and that each lot should sustain an equal amount of the assessment; the assessment will be sustained, although there be but a small portion of the grading necessary to be done opposite the lots of the owner, who objects to the assessment on that ground.

Niagara Circuit and Special Term, May, 1871.

HIRAM GARDNER, *appellant, in person.*

JAMES F. FITTS, *for the city.*

MARVIN, J.—By the charter of the city (*Session Laws of 1865, chap. 365, title 6, § 1*) the assessment is to be equally made upon the real estate deemed benefitted by the improvement, and to be estimated and determined by one of the assessors of the city, &c.

The common council may designate three of the assessors of the city.

In this case, *two* assessors acted and made their report to the common council.

The objection is now taken, for the first time, that the assessment is void. The appellant stated very fully his

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grounds of appeal, without noticing the fact that two assessors had united in the report to the common council.

In my opinion this objection is not well taken. The assessment was made by one assessor; *each* assessor made the assessment. The greater includes the less (See *Commissioners of Highways, &c., of Carmel*, agt. *Judges of Putnam County, &c.*, 7 *Wend.*, 264—where twenty persons united in the certificate for the highway, the statute requiring only twelve).

The question upon which the appellant appealed is much broader. He complains that the assessment was made upon an erroneous principle, by the application of which injustice has been done to him. Scovell Street (the street to be graded) extends from Washington Street to Monroe Street—some nine hundred and fifty feet. There are eleven lots, each seventy-five feet wide, and one lot one hundred and twenty-nine feet wide, fronting on one side of this street. The appellant owns three of these lots. Opposite to his lots, but very little grading is required. In other portions of the street a large amount of grading is required, and some deep cutting. The assessors assessed the lots alike; that is, they made the assessment a certain sum per foot; and of this the appellant complains.

I do not think the proceedings can be reversed on this ground. It does not appear that the assessors adopted, *as a principle*, that, mathematically, each lot should be subjected to the same assessment as every other lot. But on examining the premises, they decided that the benefit to be derived from the improvement would be alike and equal to each lot, and that each lot should sustain an equal amount of the assessment (*Charter, title 6, § 1*).

A court cannot say that any erroneous principle has been adopted, or that any injustice has been done. The fact that very little grading was required in front of the defendant's lot will settle nothing. Here is a street nearly sixty rods in length, extending from and to other streets. It was

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deemed necessary that the street should be graded, so that the lots upon the street could be improved, and the owners go to and from them. It may be necessary for each owner of a lot that the whole street should be graded, that he may profitably enjoy his lot.

If any injury shall result to the appellant's lots from the course to be adopted in reference to the water, I do not think that he can have his remedy by this appeal.

I am satisfied that there is no ground for reversing the order of the common council, and the proceedings must be affirmed.

Smith agt. Boyer.

SUPREME COURT.

PATRICK SMITH agt. JOSEPH BOYER, impleaded with others.

Where an *accommodation note* is made payable to two payees—one of whom indorses it, for the accommodation of the makers, upon the express agreement that the same should not be used unless the other payee also indorsed it—that the name of the other payee was then *forged* as indorser by one of the makers, who transferred the same to the plaintiff for value:

Held, in an action upon the note against the genuine indorser, that the plaintiff could not recover against him.

The rule is well settled that a *forged indorsement* does not pass a title to commercial paper, negotiable only by indorsement.

Trial before CHARLES MASON, *Referee*, May, 1871.

THIS suit is brought to recover against the defendant, Boyer as an accommodation indorser of a \$1,000 note, made by the firm of West & Kenna, payable to the order of the said Boyer and one William Kenna.

The note was presented to Boyer by Thomas M. Kenna, one of said makers, and Boyer indorsed the same for the accommodation of the said firm, and upon the express agreement that the same should not be used unless William Kenna, the other payee, indorsed the same—that the name of William Kenna was then forged as indorser upon the said note by the said Thomas M. Kenna, who transferred the same to the plaintiff for value, and the question is whether the defendant is liable as an indorser.

GEORGE W. SMITH, *for plaintiff*.

GEORGE A. HARDIN, *for defendant*.

MASON, *Referee*.—It seems to me that upon well settled principles of law, the plaintiff cannot recover against Boyer

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as indorser. The plaintiff must make title to this note, through the indorsement of the payees. (*Chitty on Bills*, 286; 1 *T. R.*, 654; 3 *T. R.*, 127; 4 *T. R.*, 28).

The rule is well settled that a forged indorsement does not pass a title to commercial paper negotiable only by indorsement. (1 *Hill*, 287; *Story on Bills*, sec., 457; 17 *N. Y.* 208; 11 *How. U. S.*, 183).

One of the two could not indorse the note to a third person. (9 *Mass.*, 334; 14 *Pick.*, 268).

There is no principle of law applicable to commercial paper by which one of the two payees who simply indorses the note for the accommodation of the maker, and has nothing to do with negotiating the same, can be held to guarantee the genuineness of the other indorsement.

The drawee, by accepting a bill, admits the handwriting of the drawer, but not that of an indorser.

The holder is bound to know that the indorsers, including that of the payees, are in the handwriting of the parties whose names appear upon the bill, and if it should appear that one of them is forged he cannot recover against the acceptor, although the forged name was on the bill at the time of the acceptance.

The reason of the rule is obvious. A forged indorsement cannot transfer any interest in the bill, and the holder has no right to demand the money. (*Hartsman agt. Henshaw*, 11 *How. U. S.*, 183; 3 *Hill's So. Car.*, 227; 2 *Parsons on Notes and Bills*, 590). This is well settled, (2 *Sandf.* 247; 11 *Mees. & W.*, 251; 7 *Taunt*, 455; 17 *May.*, 44; 14 *Md.* 556; *Story on Bills*, 263, 412).

The purchaser of a note from the maker may claim that the maker has guaranteed the genuineness of the indorsers' names, and the law is well settled that in a suit against the makers they cannot allege the forgery of the indorsers' names. (*Edwards on Bills and Notes*, 190, 178; 1 *Comst.*, 113).

And so does a subsequent indorser by his act of indorse-

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ment admit the genuineness of all prior parties where he himself transfers the note. The rule is different when the indorser merely indorses for the accommodation of the maker and the note is negotiated by the maker for his own benefit.

The indorser in such case, may make his defense. The defendant in this case has a perfect defense. If the name of William Kenna, one of the payees, had not been forged upon his note, it would have shown upon its face that it was an incomplete instrument, and which no one would have the right to make complete but William Kenna himself; and the rule in such case would require the purchaser to inquire why the other payee had not indorsed, and whether the payee who did indorse had consented to the notes being used without the indorsement of the other payee. (4 *Cranch*, 219; 11 *Vermont*, 449; 11 *Peters*, U. S., 86; 4 *B. & D.*, 440).

The plaintiff's case is worse still with Kenna's name forged after the defendant had indorsed the same upon the agreement with the maker that the note was not to be used until Kenna had indorsed it. It is not the diverting of the note, but the very making of the note is tainted with forgery. The note was incomplete until William Kenna had indorsed, and the forging of his name discharged the defendant.

The case of *Aude* agt. *Dixon*, (6 *Welsby*,) *Hurd* agt. *Gordon*, (869, *Exch.*) is in point and decides the case against the plaintiff. In that case the defendant, *Dixon*, agreed to join his brother in making a note for his accommodation, provided *R.* would sign also. The defendant signed the note, a blank being left for the name of the payee. *R.* refused to sign, and afterwards the defendant's brother delivered the imperfect instrument to the plaintiff for value, representing that he had authority to deal with and the plaintiff's name was inserted as payee. Held that the plaintiff could not recover; that under the circumstances the insertion of the plaintiff's

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name as payee was a forgery and the plaintiff could not recover.

The plaintiff could not get a good title as *bona fide* holder if his note had been unindorsed, for one who receives a note or bill unindorsed acquires no better title under it than the person from whom he received it himself had. (3 *Am. Law Reg. N. Y.*, 440, and cases). And the case in 6 *Exch. R.*, above, holds that the forgery of the payee's name cannot help him to a better title. The name of William Kenna upon the back of this note was necessary to give it negotiability, and the forgery of his name upon the note after the defendant had indorsed, must be held to avoid the note. (3 *Barb.*, 374; 21 *Barb.*, 241; 10 *N. Y.* 198; 24 *Wend.*, 374; 19 *Johns.*, 391; 17 *Wend.*, 238; 35 *Penn.*, 80).

The conditional delivery of this note back to the maker by the defendant after he had indorsed it upon the agreement that it was not to be used until Kenna had indorsed it, deprived the maker of all power to transfer it unless Kenna did indorse it. (32 *N. Y.*, 445; 11 *Vermont*, 447; 3 *Greene, N. J.*, 155; 4 *B. & A.*, 440; 3 *Wend.*, 380.)

As this note was payable to Boyer & Wm. Kenna as payees, it could not be brought under the law of commercial paper until Kenna had indorsed as well as Boyer.

The note till this was done was not negotiable under the law merchant. The complaint should be dismissed.

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SUPREME COURT.

ALONZO PUTNAM, respondent, agt. MARTIN HEATH, appellant.

The plaintiff, in an action on contract, before a justice of the peace, recovered \$135 78 damages and \$13 05 costs. The defendant appealed to the county court, and in his notice of appeal specified the following, amongst other particulars, in which he claimed the judgment should be more favorable to him:

"7th. The judgment should have been more favorable to the defendant in that damages should not have been so great by \$25."

"8th. Judgment should have been more favorable to defendant in that damages should have been not to exceed \$100, and should not have been more than \$75."

In the county court the plaintiff had judgment for \$119 17 damages, being \$16 61 less than he recovered in the court below.

Held, that the plaintiff was entitled to costs. The statement in the appellant's notice of appeal is fatally defective. It is impossible for the respondent to know what sum the appellant is willing the judgment should be reduced, and it is this information he was bound to furnish by his notice—he should have named the precise sum to which the judgment should be reduced. (*The decision in the case of Gray agt. Hannah*, 30 How., 156, not concurred in, as there the notice of appeal was that the judgment of the justice should have been for a sum not exceeding \$35.)

All that the statute requires is that the modification desired should be clearly and precisely stated, and it matters not in what language the statement is clothed, if the requisite precision and certainty are obtained.

Fourth Judicial Department, General Term, Sept., 1870.

Before MULLIN, P. J., JOHNSON and TALCOTT, JJ.

APPEAL from an order of special term, by defendant.

Mr. LOCKWOOD, *for appellant*.

By the court, MULLIN, P. J.—The plaintiff brought an action before a justice of the peace of the county of Chautauqua, to recover damages for the breach of a contract concerning butter, and recovered \$135 78 damages and \$13 05 costs.

The defendant appealed to the county court of said county.

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In his notice of appeal he specified the following amongst other particulars, in which he claimed the judgment should be more favorable to him.

“7th. The judgment should have been more favorable to the defendant in that damages should not have been so great by \$25.

“8th. Judgment should have been more favorable to defendant in that damages should have been not to exceed \$100, and should not have been more than \$75.”

In the county court the plaintiff had judgment for \$119 17 damages, being \$16 61 less than he recovered in the court below.

Both parties claimed to be entitled to costs in the county court. The county clerk taxed the plaintiff's costs at \$107 15, and refused to tax costs for the defendant.

A motion was then made in the county court by the defendant, to strike plaintiff's costs, as adjusted by the clerk, from the roll and allow the costs of the appeal to the defendant and that they be inserted in the judgment.

The county court denied the motion, without costs to either party, and from that order the defendant appeals to this court.

Section 371 of the Code prescribes that costs shall be allowed to the prevailing party in judgments rendered in appeal cases with the following exceptions and limitations: In the notice of appeal the appellant shall state in what particular or particulars he claims the judgment should have been more favorable to him. * * * Within fifteen days after service of the notice of appeal, the respondent may serve on the appellant and justice a consent, in writing, to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal. The appellant may thereupon, and within five days thereafter, file with the justice a written acceptance of such offer, who shall thereupon make a minute thereof in his docket and correct such judgment accordingly. * * * If such offer

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be not made, and the judgment in the appellate court be more favorable to the appellant than the judgment in the court below, or if such offer be made and not accepted, and the judgment be more favorable to the appellant than the offer of the respondent, the appellant shall recover costs, provided however, the appellant shall not recover costs unless the judgment appealed from be reversed on such appeal, or be made more favorable to him to the amount of \$10. * * * The respondent shall be entitled to costs when the appellant is not."

The courts have differed very widely in the construction given to this portion of the code.

It has been held by some of them, that it is the duty of the appellant to specify, in his notice of appeal, the precise modifications he desires to be made in the judgment of the justice, and that unless he is thus precise and particular the respondent is not obliged to offer to modify the judgment, and he (the appellant) is not entitled to costs if on the trial in the county court a more favorable judgment shall be recovered by the respondent. Such was the construction given to the section in *Gray agt. Hannah* (30 *How.*, 156), *Hotchkiss agt. Banks* (36 *How.*, 61).

Other courts have held that it is a sufficient compliance with the requirements of the section for the appellant to state, in his notice of appeal, that the judgment is for too much, or if he claims a modification in any other particular, to specify it in general terms, and that he is not required to name the exact sum to which he claims the judgment should have been rendered for, nor to specify the precise modification in any other respect which he may deem himself entitled to.

This was held in *Wallace agt. Patterson* (29 *How.*, 170); *Reed agt. Moore* (31 *How.*, 264).

In this conflict of authority we are at liberty to give to the section such a construction as, in our opinion, is best calculated to give effect to the manifest intention of the

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legislature, without doing violence to the language used to express it.

The design of the legislature undoubtedly was to furnish to the parties a cheap and ready way to correct errors, which may have been committed in the court below. The defeated party knows wherein, and to what extent, he has been, or deems himself to have been wronged. He is, therefore, required in his notice of appeal to point out the particular or particulars in which he requires a modification of the judgment, and that it was not intended he should do this in a loose and uncertain manner, the statute provides that if he claims the amount of the judgment is less favorable to him than it should have been, he shall state what should have been its amount.

This requirement can only be complied with by naming the precise sum to which the judgment should be reduced.

If a modification of the judgment in any other respect is desired it would seem to be equally proper and necessary that it should be specifically stated.

We cannot, therefore, assent to the proposition that the appellant complies with the statute when he states in his notice of appeal that the judgment is for too much, or in using any other loose and uncertain statement of the modification desired.

Nor can we agree with those who require the utmost precision in the statement. In *Gray agt. Hannah* (30 How., 156) the statement in the notice of appeal was, that the judgment of the justice should have been for a sum not exceeding \$35, and offered to allow judgment in favor of plaintiff for that sum. This statement was held not to be sufficiently precise and definite, and the appellant was refused costs for that reason.

Now, with the most profound respect for the learned judges who rendered that judgment, we cannot agree with them. We think the statement could not be made more definite than it is. If the first branch of the statement, that

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the judgment should not have exceeded \$35, was uncertain, that uncertainty was removed by the offer to permit judgment to be rendered for that sum.

All that the statute requires is that the modification desired should be clearly and precisely stated, and it matters not in what language the statement is clothed, if the requisite precision and certainty are attained.

If the appellant omits to comply with the statute, by stating clearly and precisely the modification of the judgment that he desires to be made, the respondent is not called upon to make an offer to modify, and a subsequent recovery in the appellate court of a judgment for a less amount than was recovered in the court below, will not deprive him of his costs of the appeal.

But let us suppose that appellant's notice of appeal is in exact conformity to the statute, and that when the judgment before the justice is \$100, he claims in his notice that it should have been for but one dollar, may the plaintiff offer to reduce his judgment to \$95, or any other sum he thinks he can recover on a second trial; if he recovers such sum, is the appellant, nevertheless, entitled to costs, because a judgment more favorable to him has been recovered?

A construction that would lead to such a result would operate most unjustly on the party recovering the judgment. He must either surrender his entire recovery, or, at the risk of being charged with the whole costs, refuse to consent to any reduction, however well satisfied he may be that he cannot, on a second trial, recover the same measure of damages, or obtain the same relief.

If the respondent is bound to modify to the extent specified in the notice of appeal, there is no escape for him from the payment of costs if his second judgment is a sixpence less than his first.

The statute is that within fifteen days after service of the notice of appeal, the respondent may serve on the appellant

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an offer to allow judgment to be corrected in any of the particulars mentioned in the notice.

Giving effect to this language, without regard to the intention of those who framed the provision, the respondent would be bound to offer to modify precisely as claimed in the notice or omit to make any offer.

If it was the intention that the respondent should conform to the terms of the notice, and was not to be at liberty to make an offer to modify the judgment by reducing it to an amount greater than the appellant claims it should be, then why require the unmeaning ceremony of making an offer by the respondent a consent by the appellant?

If the respondent yielded to the claim of the appellant, a consent to the modification was all that was necessary. It is only upon the theory that the respondent may offer to modify the judgment differently from that desired by the appellant, that an acceptance by the latter could be necessary

We are of opinion that it was not the intention to require the respondent to conform his offer to the modifications specified in the notice of appeal, but that he may offer to modify in any other respect he deems proper, but the modification must be in the respects mentioned in the notice—that is to say, if the appellant claimed in his notice that the judgment was for too much, the offer must be to reduce the amount—if the action was in the nature of replevin and there was judgment for the return of articles of property to which appellant claimed, the respondent was not entitled or had never come into the custody of appellant, then the offer must be to modify the judgment so as to require the return of less.

A subsequent clause of the same action, seems to contemplate, that the offer of the respondent is not in conformity to the claim of the appellant in his notice as it (the sum offered) and not the amount of the judgment, is the stan-

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dard by which the right of the parties to costs is to be determined.

It is provided, that if no offer is made, and the second recovery is more favorable to the appellant than the first, he is entitled to costs. But when an offer is made and not accepted, and the second recovery is more favorable to the appellant than the offer, the appellant is entitled to costs.

It is not unfrequently the subject of criticism, that the courts give to the language of an act of the legislature a meaning in one clause or section essentially different from that given to it in another in the same statute. But legislators are subject to the same infirmity in expressing their intention in words as other men, and hence, it not unfrequently occurs, that unless the intention is followed instead of the language, the object the legislature intended to attain would fail altogether, or the greatest injustice done.

The truth of this remark is very well illustrated in the case before us. If the word "particulars" in the clause now under consideration is to have the same meaning given to it as is given to it in the preceding clause, it follows that the respondent must offer to modify precisely as the appellant in his notice desired it to be modified, and he cannot escape litigation by offer to reduce the judgment to any amount larger than is claimed by the appellant, and less than the original recovery, and if the appellant is unscrupulous in his claim in his notice of appeal, he is enabled to compel the respondent to surrender substantially his whole recovery or pay costs of the appeal if his second judgment falls below the first.

This unjust result is prevented by holding that the respondent complies with the statute when he offers to reduce his judgment in the amount, when the amount is complained of in the notice of appeal, or in the relief granted when that is the subject of complaint.

The requirement that the appellant should point out the precise sum to which the judgment should be reduced or

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the precise modification in any other respect which he desires to have made, is not in the view we take of the provisions, either useless or unmeaning. It is right that the respondent should be informed of the objections the appellant has to the judgment and what modifications of it would obviate such objections. Thus informed, he can determine intelligently how much he will relinquish of his judgment, and thereby avoid litigation. A general allegation in the notice of appeal conveys to him no information. It does not enable him to form a conclusion as to the propriety of making an offer, of terms of peace. This the legislature designed he should have an opportunity to do. And that opportunity is only offered when the notice contains a precise statement of the objections of the appellant to the judgment.

If we are right in our construction of the section under consideration, it follows, that the statement in the appellant's notice of appeal in this case, is wholly defective.

The damages recovered in the justices' court, were \$135 78. In the seventh clause of the notice of appeal, the appellant claims that they should not have been so large by \$25. In the eighth, the claim is that they should not have exceeded \$100 ; and it is also claimed they should not have exceeded \$75.

It is impossible for the respondent to know to what sum the appellant is willing the judgment should be reduced, and it is this information he was bound to furnish by his notice.

The appellant must name the precise sum to which the judgment should be reduced and if he does not, the respondent is not bound to make an offer, and he is entitled to the costs of the appeal, whatever sum he may recover on the second trial.

The order of the special term is affirmed, with \$10 costs.

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N. Y. COMMON PLEAS.

MURPHY agt. BALDWIN.

The defendant is a manufacturer and dealer in carriages. His store is on the corner of 10th street and Broadway in the city of New York; over his store is a furnished apartment in which he has his meals cooked and sleeps. This apartment he has occupied for years. About a year ago he hired a house in Litchfield, Connecticut, and moved his family into it, from this city. This place defendant calls his home, and goes to it every week:

Held, on motion to vacate an *attachment* against defendant, that he is a *non-resident*, and that the motion should be denied.

Special Term, May, 1871.

MOTION to discharge attachment issued against defendant under section 227, as a non-resident.

EUGENE SMITH, *for plaintiff.*

GEORGE V. N. BALDWIN, *for defendant.*

JOSEPH F. DALY, J.—In the case of *Chaine* agt. *Wilson*, (1 *Bosw.*, 673,) the general term of the superior court of this city, decided (1858,) that a defendant whose family occupy, and for several years have occupied a dwelling house in another state, hired by him and who habitually passes the night of each day and the sabbath with his family, is a non-resident; also that whether a man's absence from his family be for eight hours in each day or six days in each week, if he has a family living in a neighboring state to whom he resorts for comfort, relaxation and repose, and with whom he abides whenever the immediate demands of his business upon his attention will permit, whenever sickness detains him from conducting that business, and when those days successively return on which business ceases and

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man rests from his labor, he resides in such neighboring state where (in every proper sense as understood no less by those who are learned in the law than by the common intelligence of every day life) is his home.

Also that where one has a home, as that term is ordinarily used and understood among men, and he habitually resorts to that place for comfort and rest, relaxation from the cares of business and restoration to health, and there abides in the intervals when business does not call, that is his residence both in the common and legal meaning of the term. That case was argued by James T. Brady, J. W. Edmonds and D. D. Field.

The opinion was written by WOODRUFF, J. and concurred in by SLOSSON and HOFFMAN, JJ.

The decision seems to be correct and has not been dissented from by a higher court.

In *Lee agt. Stanley*, (9 *How.*, 272,) the special term of the supreme court (first district), decided that the defendant, who kept a house in Bradford, New Hampshire, in which his wife and children lived and in which he entertained his friends, and which was frequently called by him his "home," resided there, and not in this state, although for two years, he had a store of goods in this state, and did business here, and actually resided in this state with the intention of making it his permanent residence.

Under the authority of these cases, it would seem that admitted facts on this motion would show the defendant to be a non-resident. He is a manufacturer and dealer in carriages. His store is on the corner of 10th street and Broadway; in this, over his store, is a furnished apartment, in which he has his meals cooked, and sleeps. This apartment he has occupied for years, except during the winter of 1869, when he resided with his family in 60th street in this city.

Where his family lived before that winter, is not stated. About a year ago, he moved his family to Litchfield, Con-

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necticut. He took a place there for them, but owns no real estate there, he has been heard to speak of it as his "home," his family there consists of his wife and children, he has no intention of changing his residence to Litchfield, he has and uses direction tags or labels printed with the address, "Theodore E. Baldwin, Litchfield, Conn." has spoken of not being in town on Saturday, saying "I am going home," that he has referred to his visits to Litchfield as "going home," that a man does his marketing here for his apartments in 10th street and Broadway, that he makes visits out of the city, not more than weekly and not longer than a day and a half, and this chiefly in the summer and fall months, he has never spent ten consecutive days in Litchfield; during the summer, his practice is to go out of town on Friday or Saturday, and return on Sunday evenings, but not in the winter, and during the last few months he has been in town almost uninterruptedly.

When his family come to the city they stop with him in his apartment; for two or three years he has shipped goods to his own address at Litchfield, addressed with small tags, and shipped furniture there from 10th street, he has shipped groceries, provisions, &c., to his own address at Litchfield from the city, for two years past.

If some light were thrown on the place of residence of defendant's family prior to the winter of '69, which they spent in 60th street, it might relieve this question of residence of some doubt, but my impressions from the testimony are, that the winter of '69 was an exceptional visit to this city from Litchfield.

It is quite likely that as the defendant has to remain at least six days of the week in New York to attend to his business, he finds a furnished room over his store more convenient and economical than boarding at a hotel, but the evidence shows this furnished apartment to be a resting place of convenience merely, and not the home of defendant.

Either his family is paying a temporary visit of several

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years duration at Litchfield, and the true residence of his wife and children is in the furnished apartment over his store, corner 10th street and Broadway, or they reside at Litchfield, and his home is with them, no matter how few the opportunities may be for him to visit them.

I think the defendant a non-resident, and that the motion should be denied.

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SUPREME COURT.

JASON FAIRBANKS agt. MARY MOTHERSELL.

As the law undoubtedly now is, in regard to the separate property of *married women*, they may make *special contracts with their husbands*, and let jobs to them of particular work, such as building and the like, the same as though they were strangers, and in such a case, where the transaction is, in all respects, in good faith, and the husband employs the men on his work in his own name and for his own benefit as contractor or jobber, and in no respect on the wife's credit, the laborers so employed would have to look to the *husband* for pay, and could not make the wife liable, the same as in any other case where a jobber employs laborers for himself to work on his job. Such an arrangement between husband and wife, however, should be regarded with suspicion; and, in case of non-payment of the laborers by the husband, the most searching and rigorous scrutiny should be instituted.

In this case the defendant owned separate real estate, and was engaged in building upon it. She let the job of digging the cellar and laying the cellar wall to her husband, and paid him therefor, according to the agreement. \$138. The husband requested the plaintiff to do some work, with his team, of plowing and scraping in leveling off the lot, and the plaintiff did not know at the time but that the husband owned the premises, and supposed he was working for him upon his own property:

In an action against the wife to recover the amount of this work, labor and services, *held*, that this work was not done upon the cellar job let to the husband, but upon the lot belonging to the wife; so the case stands simply upon an employment by the husband to work for his wife on her separate property, without any express agreement whether he should be paid by the husband or wife. The defendant knew the plaintiff was at work there, and saw the kind of work he was doing, and the law will imply a promise, on her part, to pay for the services, if it was in fact her work. Judgment for plaintiff.

Fourth Department, Buffalo General Term, June, 1871.

Before MULLIN, P. J., JOHNSON and TALCOTT, J.J.

THE action was brought in a justice's court of Jefferson county. The complaint alleges that the defendant is a married woman owning, in her own right, a lot of land situated on Washington Street, in the city of Watertown, and that the defendant is indebted to the plaintiff in the sum of fifty dollars, for work, labor and services performed

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for defendant by the plaintiff, in or about the month of November, 1868, at her request, and for the benefit of her separate estate. The answer was a general denial. On the trial it was admitted that the defendant owned the real estate as alleged in the complaint. The plaintiff testified that in November, 1868, his hired man and team performed work on the lot, plowing, scraping and leveling it off, which was worth the sum of \$37 50. The plaintiff rested, and a motion for a nonsuit was denied. The defendant's husband was then sworn, and he testified that he employed the plaintiff to do the work in question, on his own account. That he had a contract from his wife, the defendant, to dig a cellar and build the wall of the same, for which he was paid \$138. The defendant also testified that she never employed the plaintiff to do the work, and never authorized any one to employ him for her; that she let the job of digging the cellar and laying up the wall to her husband, and paid him therefor \$138. The defendant's husband also swore that he paid the claim to plaintiff. On the cross-examination of these witnesses, it appeared that the defendant, in the fall of 1868, was engaged in erecting a house upon the lot. That she employed all the workmen, either by herself or her husband, and paid them herself, except the job of digging and completing the cellar, which she let to her husband. That some time after the plaintiff's man commenced the work on the lot, defendant saw him at work and made no objections. That she gave her husband a check, some time after the work was performed, to pay for it. That her husband acted as her agent in such matters, about the building of the house, as she could not attend to personally. The plaintiff admitted, that when defendant's husband engaged him to do the work, nothing was said about defendant, or as to who should pay for it. That he made no entry, or charge for the work to any one. That he did not, when the work was being done, or for a long time after, know that the defendant owned the lot. That

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he never had any conversation or business with the defendant. He denied that the defendant's husband, or any one, ever paid him for the work. The justice rendered judgment for the plaintiff for \$37 50 and costs. The county court of Jefferson County affirmed the judgment, and the defendant appealed to this court.

MOORE & McCARTIN, *for appellant.*

D. O'BRIEN, *for respondent.*

By the court, JOHNSON, J.—The work and labor for which this action was brought, was confessedly performed by the plaintiff, on the defendant's separate property and estate; and she received the benefit and advantage of such labor. She was engaged in building a house for herself, on premises owned by her separately; and the labor was performed on the premises, in some way, as clearly appears, as preparatory to or in connection with the erection of such building. The defense to this claim is that the work was done upon the employment of the defendant's husband, on his own account, and not for the defendant in any legal sense. That the defendant let the digging of the cellar, and the laying of the cellar wall, to her husband, by the job, and paid him therefor according to the agreement, \$138, and that this work was done upon that job, for the husband. It appears that the husband requested the plaintiff to do the work and the plaintiff did not know at the time but that the husband owned the premises and supposed he was working for him upon his own property. He did not know, and was not informed, that the wife owned the property, and the husband was a mere jobber under her for any portion of the work. I suppose, as the law now is, in regard to the separate property of married women, they may make special contracts with their husbands, and let jobs to them of particular work, such as building and the like, the same as though they were strangers; and in such a case, where the trans-

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action is, in all respects, in good faith, and the husband employs the men on his work in his own name and for his own benefit as contractor or jobber, and in no respect on the wife's credit, the laborers so employed would have to look to the husband for pay and could not make the wife liable the same as in any other case where a jobber employs laborers for himself to work on his job; such an arrangement, however, between husband and wife must be an exceedingly suspicious one where the laborers had not been paid by the husband, and would be open to and invite the most searching and rigorous scrutiny. Doubtless in such a case, in view of the relation between the proprietor and jobber, the honesty and good faith of the transaction should be made to appear very clearly, in order to shield the wife from liability.

It has been repeatedly held that the wife may employ the husband as her agent, to transact any or all of her business, and this being so, I do not see why she may not contract with him to do any and all her work by the job, for a stipulated price.

In this case, however, it is not shown that the work performed by the plaintiff was upon the job of digging and walling up the cellar. The husband had no other job than the cellar. All the rest of the work on the lot was done for the defendant, as clearly appears. Plaintiff's work, as the proof shows, was plowing and scraping, in leveling off the lot. It was not upon the cellar, or at least that does not clearly appear from the evidence, and I think the justice might have well so found.

This being so, the case stands simply upon an employment by the husband to work for his wife on her separate property, without any express agreement whether he should be paid by the husband or wife. The defendant knew the plaintiff was at work there, and saw the kind of work he was doing, and the law will imply a promise on her part to pay for the services, if it was in fact her work.

Fairbanks agt. Mothersell.

Upon the question of payment, the evidence was conflicting and the finding of the justice is conclusive. The defendant testifies that she gave her husband a check to pay for this very work, but as the claim was not paid, she remained liable as before. The fact that she gave her husband the check to pay for the labor is some evidence that she expected to pay for it. It appears that the plaintiff did not charge the work to any one until after he ascertained the wife owned the property. No entry had been made of it against any one in particular, though he supposed he was doing the husband's work and expected he would pay him. There was no credit given to the husband in any other way. It was not, therefore, the husband's debt as it was not on his job, nor was it his duty to pay it.

The judgment is right, and must be affirmed.

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SUPREME COURT.

EMILY COOK agt. MARTIN KRAFT, and others.

An equitable claim on land, which existed *prior* to the recovery of a judgment, is given a preference over judgments docketed afterwards; but in no case is that preference given where the equitable right *did not exist prior to the recovery of the judgment*.

There is no principle of equity by which a purchaser of real estate or of a lease, which, at the time of the purchase is subject to the lien of a judgment, (as in this case) can claim *improvements subsequently made* by him, although without knowledge of the judgment to be exempt from the lien.

New York General Term, June, 1871.

Before INGRAHAM, P. J. BARNARD *and* SUTHERLAND, JJ.

APPEAL from judgment at special term.

On February 3d, 1863, the defendant, Banker recovered a judgment against Martin Kraft, for \$442 21-100, and said judgment was on the same day docketed in the office of the clerk of the city and county of New York.

That on the 18th of June, 1863, the defendant, Reeve also recovered and docketed a judgment against him for \$305 06-100, in the same office.

That on May 1st, 1867, Kraft took a lease of the premises in question of J. L. Phelps, for the term of nineteen years, which was recorded same day, in Liber 1014, page 560.

On July 8th, 1867, Kraft made a mortgage thereon to one Klauber, for \$2,000.

On August 15th, 1867, the mortgage for \$1,800, thereon to Herdtfelder was made for an indebtedness then due to mortgagee, without any equity. And on January 23d, 1868, the mortgage thereon to Kreuder, was made for \$1,000

That each of said mortgages have been paid and the lien

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discharged. The plaintiff had assumed to pay them as a part of the consideration for the transfer of said lease to her.

D. M. PORTER, *for appellants.*

I. The judgment of Reeve and Banker are valid liens upon the leasehold in question, (a chattel real). (*Sec 5, 3d, R. S. 5th ed., p. 10*); and the record was notice to the mortgagees and all others. (*Sec 4, 3d, R. S., 5th ed. p., 637; Crosby agt. Wood, 2 Seld., 369*).

II. The three mortgages having been voluntarily paid and the mortgage liens discharged of record by a stranger, in no wise connected with their origin, they have ceased to exist, and cannot now be set up against the liens of said judgments which are still in existence. Even if these mortgages were unpaid, she, having no connection with the original transactions, cannot intervene and postpone our liens to the mortgages, as she would be the holder of the bald mortgages, without any other rights.

III. The evidence as to the want of knowledge of the existence of said judgment liens on the part of the plaintiff at the time "she paid the moneys and purchased the lease," under appellants' objection, was improperly admitted.

(a.) As the evidence did not relate to the original parties to the three mortgages, and as their priority must be determined by their state at the time they were recorded, which was about two years before plaintiff became interested in them or in the premises, the proof was immaterial and incompetent.

(b.) Because the record was notice; and, although the plaintiff "knew judgments were liens, she did not examine," she was negligent, and her want of knowledge cannot overcome the positive provisions of law that a docketed judgment record is knowledge.

IV. There is no evidence but what the original parties to the transaction knew all about appellants' judgment

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liens. Whether the plaintiff, a stranger to the transactions out of which the mortgages arose, knew or not, cannot affect their validity, nor increase their force nor priority, nor affect appellants' liens.

There is no evidence that the mortgages were made in pursuance of any agreement, before appellants' liens attached; the three mortgages were clearly made without any agreement whatever.

V. The authorities cited by respondent are all where there was an agreement (prior to the judgment being docketed) creating an equity, and without which no title would have passed upon which the judgment could have become a lien.

Here appellants' liens had attached before any agreement had been made for constructing the improvements.

VI. Appellants' liens being notice of themselves, no equities were created by the transactions between Kraft and his mortgagees, as they *were all originated after appellants' liens had attached.*

VII. There is no evidence to support the ninth finding of fact, and it is an erroneous conclusion of law.

VIII. The exceptions should be sustained.

IX. The extra allowance is twice what the court had power to give.

The judgment should be reversed.

PETER COOK *and* THOMAS DARLINGTON, *for respondent.*

I. It appearing that the lease in question was wholly worthless before the expenditure of the moneys secured to be paid by the mortgages thereon, which moneys were used in making improvements upon the premises, and said expenditures being made in good faith under the advice and direction of the attorney, Mr. Cook, and it appearing that he had no knowledge of the existence of said judgments until more than two months after the purchase by his wife,

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also made under his advice—the plaintiff is entitled to be considered in the light of a *bona fide* purchaser, and as having a superior equity to the claim of the judgment creditor.

The plaintiff, in fact, seeks to recover back the money necessarily expended by her and her assignors in improving the property and saving the same from forfeiture and have a superior lien as to those amounts over every other person.

The case, *Tallman* agt. *Farley and others*, is a case in point. In that case it was held: Where mortgaged premises are sold under a prior mortgage, and there is a surplus arising from the sale, which is brought into court, such surplus belongs to the mortgagees, rather than to judgment creditors of the mortgagor, although their judgments are prior in date to the second mortgage.

Judgment creditors are entitled only to such rights in the real estate of the debtor as the debtor rightfully possesses. They can take all that belongs to the debtor and nothing more. *Tallman* agt. *Farley and others*, (1 Barb., 280).

Also see opinion by court in above case. See also *Whitforth* agt. *Guagin*, *The Jurist*, May 4, 1844, p. 374.

II. The proof is, that there was no knowledge of the existence of the judgments until two months after the purchase of the premises by plaintiff.

Such proof, although given, was unnecessary.

And not only is a *bona fide* purchaser for a valuable consideration without notice, protected in equity against a plaintiff seeking to overturn that title; but a purchaser with notice is entitled to the like protection. For otherwise, it would happen that the title of such a *bona fide* purchaser would become unmarketable in his hands, and consequently he might be subjected to great losses if not utter ruin.

The question sometimes arises as to who is to be treated as a *bona fide* purchaser in the sense of the rule; and it has

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been held that a judgment creditor by elegit, is not entitled to be deemed such; but he takes only such rights in the premises as the judgment debtor rightfully possessed. Thus, for example, a judgment creditor cannot hold an estate subject to an equitable mortgage by an elegit executed on the estate of the debtor mortgagor, except subject to such equitable mortgage, although he had no notice of the mortgage at the time of the elegit. (2 *Story's Equity Juris.* § 1503, *A & B.* 997, 998, 999).

The knowledge by the plaintiff and her assignors that their money improved and saved the property, is alone sufficient to entitle her to priority of the judgments, although they had knowledge of the existence of them.

In neither the cases decided was a want of knowledge of the existence of the judgments required to be proven.

III. The case, *Crosby agt. Wood*, (2 *Seld.*, 371,) solely relied upon by the defendants, is not a parallel case. In that case the money loaned did not improve nor increase the value of the property.

But even in that case, *JOHNSON, J.*, page 373, in rendering the opinion says:

"The judgment was at the time of the execution of the mortgage unsatisfied in fact of record, and a legal lien on the land, and no circumstances then existed entitling the mortgagees to a priority in equity over this legal lien.

The only remaining question is, whether the mortgagees have, by matters subsequently arising, acquired any right which entitles them to be preferred in equity to the judgment creditor," which decides clearly that there are cases in which a mortgage given subsequent to the entry of judgment, may have priority over the same, and this decision confirms the case of *Tallman agt. Farley and others*.

IV. There is no injustice done by the judgment in this case to the defendants, Banker and Reeve, as the premises in question are directed to be sold, and out of the proceeds

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the plaintiff is to be paid first, and the surplus is to be paid to them.

For these reasons, the judgment is correct and should be affirmed.

By the court, INGRAHAM, P. J.—The case of *Tallman agt. Farley*, (1 *Barb.*, 280,) is not a case similar to the present. In that case, the deed of the lots was left in escrow under an agreement that the purchaser should go on and erect buildings thereon, and when money sufficient had been expended on the building to secure the consideration money for the land, and the amount of money advanced by the seller, the deed was to be delivered and a mortgage executed for the whole.

The judgment in the case was recovered prior to delivering the deed, and the judgment creditor sought to be preferred over to the mortgage, and the court held that the mortgage constituted an equitable lien entitled to preference over the judgment. It was then said, that the judgment creditor is entitled to all that the debtor had in the property at the time of the recovery of the judgment. They can take all that belonged to the debtor and no more.

Part of the consideration of the mortgage in that case was the consideration money for the land which always entitled to priority over a prior judgment.

The correct rule is given by the chancellor in *Kierstead agt. Avery*, (4 *Paige*, 9,) when he says: "A judgment being a general lien on the land of the debtor is subject to every equity which existed against the land in the hands of the judgment debtor at the time of docketing of the judgment."

So in the *Matter of Howe*, (1 *Paige*, 125,) it was held that judgment creditors had no preference over prior equitable claims, but were limited to the estate as it existed at the time of recovering the judgment. An equitable mortgage

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not recorded, was given priority over judgments docketed subject to the agreement for the mortgage.

So where a defective mortgage was perfected after judgments recovered prior thereto, the court decreed a perpetual injunction against the judgment, unless the creditor would redeem the mortgage. (*See also Burrs agt. Burrs*, 3 *Ves. Jurs.*, 576; *Finch agt. Eckel*, *Winchester 1 Prince Wm.'s Rep.* 282; *Foster agt. Fouat*, 2 *Serg. & Rawle*, 11; *Burchard agt. Phillips*, 11 *Paige*, 66).

In all the cases I find the principle to be the same, viz., that the equitable claim on land which existed prior to the recovery of the judgment is given a preference over judgments docketed afterwards; but in no case is that preference given where the equitable right did not exist prior to the recovery of the judgment.

I know of no principle of equity by which a purchaser of real estate or of a lease which at the time of the purchase is subject to the lien of a judgment can claim improvements subsequently made by him, although without knowledge of the judgment to be exempt from the lien. The law supposes the party purchasing to know of the lien and charges on him, the consequences of such knowledge. If, when such lien exists, he voluntarily expends money on the premises, the same becomes subject to the lien. Any other rule would virtually destroy the lien of a judgment on real estate. The principle upon which equitable liens are allowed to have priority is, that the contract was made before the docketing of the judgment. After that date the property with any subsequent improvements is subject to the lien.

Where something has been done by the assignee of a lease to prevent the lease from forfeiture, it may be that equity would enforce a priority for the payment of such claim over a prior judgment. But such claim must be for some other cause than the ordinary rent and taxes of the premises. It must be something which the lessee was not bound by the

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lease to pay, and which has had the effect to preserve the security for the benefit of a judgment creditor. Such a claim would be the payment of an assessment which the lessor was bound to pay and did not, the payment of which prevented the termination of the lease by a sale.

The learned justice erred in holding the moneys expended after the recovery of the judgment by the plaintiff were exempt from the lien of the judgment recovered prior thereto, and should be paid before such judgment.

Judgment should be reversed, and a new trial granted, costs to abide event.

Hague agt. O'Conner.

N. Y. SUPERIOR COURT.

BENJAMIN HAGUE, plaintiff, agt. OWEN O'CONNER,
defendant.

Proof of a parol agreement between a plaintiff and a defendant to the effect "that, in case plaintiff would procure certain lands of the defendant to be sold, or would find a market for the same, at an aggregate price of not less than a certain sum named by the defendant, the defendant would sell the lands for said price and pay to the plaintiff for his services one half of the excess, which the plaintiff would procure to be given over and above the sum named by the defendant," followed up by further proof showing full performance on the part of the plaintiff at a price exceeding the limit named by the defendant and a subsequent refusal of the defendant to convey, is sufficient to entitle the plaintiff to recover his compensation, as agreed upon.

General Term, June, 1869.

ALBERT ROBERTS, *for plaintiff.*

CHARLES D. INGERSOLL, *for defendant.*

By the court, FREEDMAN, J.—The action is based upon and upon the trial the plaintiff proved, a parol agreement made and entered into between him and the defendant in about the month of September, 1867, to the effect that in case plaintiff would procure certain lands of the defendant to be sold, or would find a market for the same, at an aggregate price of not less than seventeen thousand dollars, the defendant would sell the lands for said price, and pay to the plaintiff for his services one half of the excess which the plaintiff could procure to be given over and above the said aggregate sum. The evidence further shows, and it is not disputed, that in pursuance of said agreement, the plaintiff appraised the property, divided it into lots, made a map, and estimated the price of each lot; that he submitted the map and appraisal to the defendant, who approved of it as made;

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that plaintiff thereupon got circulars printed, and went round with them, and finally procured purchasers for all the lots at the aggregate price of eighteen thousand four hundred and seventy-five dollars; that Thursday evening, the 13th of February, 1868, was appointed between the parties to this action and the purchasers as the time, and Farmers' Institute as the place, for the delivery of the deeds, and that a meeting of all parties took place accordingly. It appears, however, that the defendant, not having the deeds ready for delivery at the appointed time and place, applied for and obtained an adjournment until the following Tuesday, February 18, 1868, but that at the same time he commended the plaintiff for the manner in which the latter had managed the business and informed the purchasers that the plaintiff was not to blame for the delay. On the 18th another meeting of the plaintiff and the purchasers took place pursuant to adjournment, but the defendant did not appear, and again made a default in the delivery of the deeds. Upon these facts, I think the plaintiff is entitled to recover his compensation as agreed upon. I am of the opinion that he has shown a perfect cause of action, which could not be defeated again by the introduction by defendant's counsel upon plaintiff's cross-examination and against plaintiff's objection of a new agreement, alleged to have been made by plaintiff on the day after the second default of the defendant, for the reason, amongst others, that the evidence, as it stands, shows that the plaintiff was induced by the defendant to sign it upon the representation and in the belief that it related solely to an allowance by plaintiff to defendant of five per cent. out of his share of the profits, and that the plaintiff did not know or suspect it to contain anything else.

The plaintiff's exception to the order dismissing his complaint should be sustained, and the said order of dismissal should be reversed, and a new trial granted, with costs to abide the event.

MONELL and JONES, JJ., concurred.

Moran agt. McClearns.

SUPREME COURT.

FRANCIS H. MORAN, respondent, agt. WILLIAM MCCLEARNS,
appellant.

In an action against an overseer of highways for wrongfully diverting a water-course on the plaintiff's land, it is error for the judge to instruct the jury that the diversion of the waters on the plaintiff's land was wrongful, and that the plaintiff is entitled to recover the damages he has sustained thereby.

Whether the diversion was wrongful or not, depended upon a variety of questions of fact which were, and fairly might be, controverted upon the evidence, and the statement of the court to the jury seems to preclude any consideration by them of the various facts in controversy, and upon which the legal right depended, and which it was error to withdraw from the jury, and pass upon as a question of law.

It is also error for the court to instruct the jury that if the defendant acted *maliciously* in diverting the water, to injure the plaintiff, the plaintiff was entitled to recover all the damages he had sustained, whether the defendant had a right to turn the water or not.

This amounts to an instruction to the jury that, notwithstanding a *public officer* may be fully warranted and duly authorized in law to do the act complained of, yet his *motives* are, in such a case, the subject of inquiry by the jury, and if they come to the conclusion that his motives were selfish and sinister, then the act becomes unlawful.

Such a rule determining the liability of public officers—not according to the lawfulness of their acts, but according to what a jury may suppose to have been their secret motives—cannot be tolerated.

Fourth Department, Submitted May General Term, 1871.

Decided at June Term, 1871.

Before MULLIN, P. J., JOHNSON and TALCOTT, JJ.

THIS was an appeal from a judgment of the county court of Onondaga County, in favor of the plaintiff. The action arose in justice's court, where the plaintiff recovered \$140 damages. Upon an appeal brought by the defendant to the county court of Onondaga County, the action was tried before Hon. HENRY RIEGEL, county judge, and a jury, and

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resulted in a verdict in favor of the plaintiff for the sum of \$150.

The facts, so far as they are material, are sufficiently stated in the opinion of the court.

LUDINGTON & GILLESPIE, *for respondent.*

FULLER & VANN, *for appellant.*

By the court, TALCOTT, J.—The action was for wrongfully diverting a watercourse on the plaintiff's land, to his damage. The defendant justified as overseer of highways. The facts seem to have been that the defendant, as overseer of highways, had opened a ditch on the west side of a road in his district, which had, for some time, been obstructed, and had also destroyed a sluiceway which had been constructed by the trustees of a school district, across the same road, whereby the water flowing on the west side was carried across on to an east and west road; the effect of which was, at times, to excavate the east and west road, and render it dangerous, if not impassable. Another effect of the sluiceway which had been made by the trustees of the school district, was to throw upon the defendant's farm water from the west ditch, which had not before been accustomed to flow on his land, and to subtract a considerable quantity of water from that which had formerly flowed down the west ditch and thence, by another existing sluiceway, across the road on to the land of the plaintiff.

It was claimed by the plaintiff that in thus changing the course of the water, the defendant was actuated by motives of self interest to protect his own land, and not by motives connected with the public interest, or by a design to injure the plaintiff.

On the trial, the question as to where the water had been accustomed to flow before the trustees of the school district had changed its course, was litigated; and the defendant gave evidence tending to show that, from time immemorial,

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the water had been used to flow down the west ditch until the time when it was thus intercepted by the trustees of the school district; and also tending to show the material injury to the east and west highway which was produced by the change which had been made; and tending to show that the acts done by the defendant only restored the water-course to its ancient condition, and were proper to protect the east and west highway.

Among a great variety of propositions, the court, on the trial, stated to the jury as follows:

"I think, therefore, that the diversion of these waters upon the plaintiff's land, was wrongful, and that the plaintiff is entitled to recover the damages he has sustained by reason of the diversion of these waters upon his land."

To this the defendant excepted. This appears to have been an instruction to the jury that the plaintiff was entitled to recover, and not a mere intimation of an opinion on a question of fact, and must have been so received.

Now, whether the diversion was wrongful or not, depended upon a variety of questions of fact, which were, and fairly might be, controverted upon the evidence, and the statement of the court to the jury seems to preclude any consideration by them of the various facts in controversy, and upon which the legal right depended, and which it was error to withdraw from the jury and pass upon as a question of law.

Again: the court instructed the jury as follows:

"If you come to the conclusion that the defendant acted maliciously in diverting this water, that he did not do it because he deemed it a public duty, or because he deemed it reasonable and proper for him to do it as a public officer, but did it maliciously to injure Mr. Moran, then the plaintiff is entitled to recover all the damages he has sustained, whether he had a right to turn the water or not."

This instruction was excepted to. It amounts to an instruction to the jury, that notwithstanding, a public officer

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may be fully warranted and duly authorized in law to do the act complained of, yet, his motives are in such a case the subject of inquiry by the jury, and if they come to the conclusion that his motives were selfish and sinister, then the act becomes unlawful.

It is scarcely necessary to say that such a rule determining the liability of public officers, not according to the lawfulness of their acts, but according to what a jury may suppose to have been their secret motives, could not be tolerated. In civil actions the inquiry is first as to the lawfulness of the act complained of. If the act be unlawful, the motives which have actuated a party, may in many cases operate upon the question of damages, but the motives can rarely be a subject of inquiry where the act done was in the exercise of a clear legal right. It was no valid objection to the justification of the defendant that he had not been ordered by the commissioners of highways, to make the repairs in question. It is made the duty of the overseer of highways under a penalty to keep the highways in his district in repair, and it is well settled that this duty devolves upon him whether he has been directed by the commissioners or not. (*McFadden agt. Kinsbury*, 11 *Wend.*, 667).

The judgment of the county court must be reversed, and a new trial granted in that court, costs to abide the event.

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COURT OF SESSIONS.

THE PEOPLE OF THE STATE OF NEW YORK agt. SIDNEY
BURR.

A *tradesman* to whom raw materials are given to be converted into manufactured articles, (leather stock to be manufactured into shoes,) who contracts and receives them in good faith, is not guilty of *embezzlement*, by a subsequent *wrongful conversion* of the manufactured articles.

The employment of the tradesman, is an *independent contract*, and creates not the relation of master and servant, but that of *bailor and bailee*.

Kings County, June, 1871.

THE defendant was tried and convicted of embezzlement at the May term of this court. Several questions presented by the case, being reserved for subsequent consideration and disposal.

TROY, J.—The evidence established the following facts:—The defendant, a boot and shoe maker, residing in the city of Brooklyn, was occasionally employed as such by the prosecutor who was a shopkeeper in the business of manufacturing and selling boots and shoes in the city of New York, to manufacture for him, he furnished the materials ready cut and prepared for manufacture, the defendant taking those materials to his own house and returning the work when completed. He was not paid regular wages; his compensation depending upon and being regulated by the quantity of work performed at fixed prices, and payment to be made on the completion and return of the work as agreed on.

He was not permanently or exclusively employed by the prosecutor, but did such other work in addition to that furnished by him as he could obtain.

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In January last he received from the prosecutor at the city of New York, "seventy-two pairs of stock for shoes," of the value of sixty-five dollars, to be made into shoes and returned when completed; that he brought the goods to his home in Brooklyn, and having completed the work, he carried it to New York, for the purpose of returning it to the prosecutor, when under the influence of liquor he sold, or consented to the sale, of the property, and shared the proceeds with a companion.

The statute defining the offense of embezzlement, declares that, "if any clerk or servant of any private person, or of any copartnership, (except apprentices and persons within the age of eighteen years,) or if any officer, agent, clerk or servant of any incorporate company, shall embezzle or convert to his own use, take, make away with, or secrete with intent to embezzle, or convert to his own use, any money, goods, rights of actions, or other valuable securities or effects whatever, belonging to any other person which shall have come into his possession or under his care by virtue of such employment or office, he shall upon conviction be punished in the manner prescribed by law for feloniously stealing." &c.

The indictment in this case describes the prisoner as the clerk and the servant of prosecutor, and charges him with having embezzled "seventy-two pairs of stock for shoes."

Embezzlement is a species of larceny, and the term is applicable to cases of furtive and fraudulent appropriation by clerks, servants or carriers of property coming into their possession by virtue of their employment, it is distinguished from larceny, properly so called, as being committed in respect of property which is not at the time in the actual possession of the owner. (*See 4 Blackstone's Com*, 220, 231; *Burrill's Law Dic.*, vol. 1, p. 415; *Barbour's Crim. Law*, 149; 3 *Archabold's C. P. & P.*, 449; *Roscoe's Cr. Ev.* 414; *Russell on Crimes*.)

To constitute larceny, it is necessary that the property

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should be taken from the possession of the owner or person in possession thereof with a felonious intent, and it may be committed by any person; whereas embezzlement under our statutes can only be committed by a clerk or servant of a private person, or of a copartnership, or an officer, agent, clerk or servant of an incorporated company, or by a carrier; it cannot be committed with respect to property in the possession of the owner, employer or master, but only of such property as shall have come into the possession of the class of persons described, by virtue of their employment or office. The law contemplates a lawful possession in the servant acquired from some person other than the master, but by virtue of his employment and his appropriation while in *transitu* before it reaches the hands of such master or employer or is applied to the purposes directed by him. When the property or money received is delivered to the owner by the servant, or applied as directed by him, it ceases to be the subject of embezzlement, and if taken thereafter feloniously, it is larceny, not embezzlement. (*See 2 Leach. 831; 1 Leach., 28; and cases referred to.*)

And a distinction is drawn in this country, as was formerly in England, between the case of property or money placed in the hands of the servant or clerk by the master or employer for any purpose, and the case of money or property received by the clerk or servant for the master from a third party. In the first case, the clerk or servant is decided to have merely the custody of the property as contra-distinguished from the legal possession, which remains in the master or employer. In the other case, as the person paying the money or delivering the property to the servant intends to part, and does part, with the possession and the temporary or permanent control of the thing delivered, and as the master acquires no possession or control until delivery to him, and in the mean time possession and control must be in some one, the clerk or servant is the only person who can be said to have such possession.

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Now, by the term custody of property as contra-distinguished from legal possession, I understand to be meant, that, charge to *keep* and *care* for the owner, subject to his order and direction without any interest or right therein adverse to him, which every servant possesses with regard to the goods of his master confided to his mere care, which custody may be terminated or prolonged according to the will and pleasure of the master. But where the owner of personal property delivers it to another for any purpose, intending not only to part with the custody but with the absolute right or control of the property *for any length of time*, he parts not only with such custody but with the legal possession as well, for the actual possession of the property with a cessation of the rights of ownership for a period, however short, transforms such actual possession which under other circumstances might create but a mere custody, into a legal possession in the person having it; and that this is so it seems to me there can be no doubt, for if the manual possession is gone from the owner, and the right of ownership and control is ever so temporarily suspended, where can the legal possession be, if not in the person having the manual possession and the right to hold it as against every one? For the owner has not the manual possession and his right as owner has ceased by temporary waiver, agreement or otherwise, so having neither the manual possession or the right of disposal, such possession and right must be elsewhere; and if elsewhere and united in the same person, it constitutes a legal possession for the time being against the world.

Consequently, where a bailment occurs in good faith on both sides, and the bailee subsequently converts the property, he cannot be convicted of larceny, for it is not a taking from the owner, and he cannot be convicted, of taking from his own possession.

Accordingly, if a man hire a horse to ride a journey, intending at the time to return him, and sell him afterwards

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on the road, he cannot be convicted of larceny—of course he would have no right to sell—the purchaser would take no title, not even the use of the animal for the unexpired term of the bailment, because the bailment would be determined by the wrongful act, and the owner could claim his property *instantly*; but the bailee could not be convicted of larceny, for he had the actual possession and the right thereto as against the owner, and therefore the legal possession, or if in the case last supposed, the property should be stolen from the bailee by a third party; the indictment might describe the property as that of the bailor or bailee; but in either case it must necessarily charge that it was taken from the possession of the bailee, and if it charged that such property was taken from the possession of the real owner, and it appeared that such taking was during the bailment while the owner had neither the actual possession or right thereto, the thief could not be convicted thereunder.

Now, the facts in this case being settled, the first question arising for determination is, does the defendant come within the class of persons described in the statute by whom the crime of embezzlement can be committed?—in other words, was he a clerk or servant of the prosecutor? I do not think he was either; he was certainly not the clerk of the prosecutor, and I cannot regard him as his servant in any sense of the term;—of course the term “servant” does not mean nor is the language limited in its application to the mere menial servant of the prosecutor, but it does mean and intend that relation between the parties which gives the employer the right to order, command, direct and control, and imposes on the person employed the duty of obedience and subjection in the performance of the particular service, at all times and in every particular, and with regard to the property of the master delivered by him to the servant in the course of such employment, gives to such servant the temporary custody thereof merely, the legal possession remaining in the owner.

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The employment of the prisoner in this case, was not of such character, it was an independent contract and created, not the relation of master and servant, but that of bailor and bailee. The property was delivered to the prisoner in pursuance of this contract to be returned to the bailor when the contract was completed. The bailor parting not only with the custody but with the possession and his right to control same, until the completion of the contract, reserving no right to control or direct the bailee in the mean time, either in the performance of the work, the place of performance or the agency or manner of such performance.

The bailor could not demand, nor would he be entitled to reclaim, the said property before the completion of the contract; he could not dictate to the bailee as to whether the bailee himself should do the work or whether it should be done by others under the bailee's direction; he had no right to say at what place or places it should be done, or prescribe the means of doing it; he could only hold the bailee responsible for a performance of the contract, without having any power over the agency by which such performance was effected, and when the contract was completed he could not then compel a delivery of the property without paying the contract price; on the other hand, the bailee had a right to perform the work where he pleased, to do it himself, or employ others to do it, as he thought proper; his duty to the bailor was to fulfill the contract; the way, manner, and means, of such fulfillment resting entirely with himself. He had a lien also upon the property for the contract price and the right to hold the property as against the bailor for a sufficient time to perform the contract, and thereafter until paid he had not only the custody but the possession of the property, and possession coupled with an interest as against the bailor, the right of the prosecutor as owner to reclaim or interfere with the property being suspended during the performance of the contract.

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On the other hand a servant is at all times and places, while in the service of the master and about the performance of his servitude, subject to the commands and directions of such master; the manner of performing the work, the means of such performance, the place thereof, and all the details in respect thereto, are equally within his control; he can stop the work when he sees fit, change the original directions given about it from time to time, do it as he pleases and alter it again as he may desire; take the property from the custody of the servant, and discharge him at his pleasure. The servant would have a mere custody, the legal possession remaining in the master. The servant would have no lien for his labor on the property, and without possession none could exist. The master would have the absolute control—the servant would be the mere machine.

The distinctive characteristics of the relations of master and servant and bailor and bailee, are so clearly marked and defined that no doubt can be entertained of the real nature of the relationship existing between the prosecutor and the prisoner. In this case it was that of employer and employee, under a contract between the parties whereby mutual and independent rights were created and conferred, and the prisoner was in no sense of the term either the clerk or the servant of the prosecutor.

As the conclusion I have come to on this point substantially disposes of the conviction, it might not be necessary to regard the other matters which effect it. And yet it may not be proper to pass over any other defect which would render the conviction invalid, independent of the correctness of my views on the first point. And that there are others fatally defective there can be no doubt. In the first place, the indictment charges the embezzlement of stock; the proof is that the stock was made into shoes by the direction of the owner. The act of thus converting the stock into manufactured articles did not constitute an illegal

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appropriation to the use of the prisoner ; that he thereafter made away with the shoes is beyond doubt ; but it was *shoes* he appropriated, not *stock*,—he could not therefore, if the other facts necessary to constitute embezzlement existed, be convicted thereof under the indictment of embezzling *stock*, the proof being of *different articles*. (See *Com. agt. Merrifield*, 4 *Met.*, 468.) In the second place—apart from what has been already said—if the unauthorized appropriation of the property constituted any offense, such offense was committed in the city and county of New York, and without the jurisdiction of this court.

I can find no case under our statutes at all analogous to this. The idea is entirely new to me that a tradesman to whom raw materials are given to be converted into manufactured articles, who contracts and receives them in good faith upon a contract such as existed in this case, would be guilty of embezzlement by a subsequent wrongful conversion. Perhaps the act should be made a crime,—morally there may be no difference between it and the acts which constitute embezzlement ; but it is certainly not a crime at common law, and, therefore, until our statutes make it one, the courts cannot so regard it. It may be said this view of the law imposes hardship upon employers, but I do not see that such is the fact. It is simply necessary that they should use discrimination in the selection of workmen, and know who they are dealing with ; in this way they can protect themselves, or in many others ; they may require security, or make such special contracts as by retaining in themselves the legal possession and constituting the person employed but a mere servant, as will bring such person within the statute of embezzlement.

The English cases afford very little light on the subject, as the English statutes relating to it are broader and better than ours ; in fact, in England, except so far as the mere proof is concerned, the distinction between embezzlement and larceny has ceased to exist ; a conviction can now be

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of either offense under an indictment charging the other. (See 24 and 25, *Victoria, C.*, 96 §§ 68, 72). And the question of possession is disposed of by a special statutory provision, declaring that the property shall be deemed to have been taken from the possession of the master or employer, although such master or employer did not receive same, other than by the actual possession of the clerk, servant, or person employed.

Entertaining these views, it becomes the duty of the court to set aside the verdict herein; and as there is considerable doubt with regard to the power of the court to set aside a verdict without ordering a new trial, the order will be in that form; but as a new trial in this case would be but a mere matter of formality, and a conviction could not under any circumstance be had, the prosecuting officer, if he desires it, can have an order of *nolle prosequi*; but in the meantime, whether such order is entered or indictment retried, the prisoner is discharged without bail.

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N. Y. SUPERIOR COURT.

DAVID GROESBEECK, plaintiff, agt. WM. E. DUNSCOMB and
MORGAN DIX, defendants.

A demurrer to a pleading admits all the material facts stated in that pleading, but alleges that those facts in law do not constitute a cause of action or defense, as the case may be.

A demurrer admits all the allegations, but it admits nothing but what is material and well pleaded, and it is only a technical admission, and does not involve a confession. Conclusions of law are never admitted by a demurrer.

Where a corporation is not made a party, its property cannot be taken from it and put into the hands of receivers.

Where the directors of a railroad company are sued individually, a receiver cannot be appointed to take charge of the affairs of the road; nor can one of two *cestui que trusts* be sued without the joining of the *cestui que trusts*.

The legal estate of every corporate body is vested, not in the individual corporators, but in the corporation itself; the estate, however, is a trust for the benefit of the corporators.

By the wise policy of the law, corporate bodies are forbidden to be seized to a use; but, by a like policy, this law permits them to be vested with a trust.

Where a plaintiff desires to establish his claim to be a corporator, or to preach in the church of the corporation, or to have a receiver appointed to take charge of the corporate property, he cannot have such relief in an action against private individuals.

Where property is described, in a complaint, as being in the possession of defendants and their associates, styling them "The Rector, Churchwardens and Vestrymen of Trinity Church," and where it is not alleged that they are not entitled to these offices, their possession and acts are those of the corporation, and the corporation alone is the party to be held responsible for them.

Where predecessors are spoken of, it is equivalent to admitting that defendants have succeeded to the office of such predecessors.

Where defendants are, by the supposition of the complaint, possessed of property not in their own right, but in the right of the corporation, they ought not to surrender such property to a receiver without having the corporation before the court to defend its rights.

Statements in a pleading must be taken as strongly as possible against the party making them.

Where a party alleges that he is a corporator, or a successor to a corporator, it is very bad pleading if he do not also allege how he became a corporator, or a successor to a corporator.

Before a suitor can claim the interposition of a court of justice, either in law or in

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equity, he must have some wrong to remedy, some grievance to redress, or some claim to enforce.

It is common for legislative bodies, in novel and special cases which have eluded the penetration of former legislators, to pass acts, in the nature of declaratory acts, to pluck up discord and litigation by the roots, that general quiet may be promoted. Such acts resemble bills of peace in chancery.

Members of every corporation have an interest in its estate while they continue members, and no longer.

A right to the corporate property is strictly local in its enjoyment. Whenever a corporator removes and settles permanently without the precincts of the corporation, his franchise, *ipso facto*, ceases. Thus, if an inhabitant of the city of New York quits the city and takes up his residence in the county of Westchester, he relinquishes his rights as a member of the city corporation, and he cannot resume them in any other way than by returning and again fixing his residence in the city.

By the discipline of the English church no person can at the same time be a regular communicant in separate parishes under the care of different and independent rectors. The canons of the church particularly direct that the "sacrament shall not be administered by the rector of one parish to the parishioners of another, without the license of the rector of the latter parish, except to travelers, to persons in danger of death, or in cases of necessity."

The rector is authorized, under certain circumstances, to refuse the sacrament even to his parishioners.

The only legal evidence that the parishioner is a communicant is his receiving the sacrament in the parish church, by and with the consent of the priest, and the rector cannot take notice of the receipt of the communion in other parishes.

In expounding a statute, we are to presume that the legislator used words in their most usual signification—that he had the subject-matter constantly in mind—that all his expressions were directed to a reasonable end—that his train of thought was uniform—and that he intended to infuse into every part of the statute the same spirit.

Although legislatures should be inflexible in their resolutions to preserve the inviolability of private property, yet they can exercise their discretion in moulding the elective franchises of corporations into new shapes, the better to adapt such corporations to the progress of the times.

Special Term, February, 1871.

First. The amended complaint of the above-named plaintiff respectfully shows to this honorable court :

Second. That he is a citizen of the United States, and an inhabitant of the city of New York, and a successor of some of the original inhabitants thereof of Holland, who were corporators of a corporation chartered and granted by the following title :

"The rector and inhabitants of the city of New York in communion of the church of England as by law established, passed, 27th June, 1704. as an amendment of the original

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charter of Trinity Church, in said city, granted by the title of the rector and inhabitants of our said city of New York, in communion of our protestant church of England as now established by our laws; passed on the 6th May, 1697."

Third. And plaintiff includes in this complaint so much of said original charter as this court may direct to be produced, but especially so much of the fourth section thereof as may show in what manner the funds were raised to build the original Trinity parish church and rector's parsonage house, and fence and inclose and grade the burial grounds adjoining said parish church by a "pound rate or otherwise," by taxes "charged upon all and every of the inhabitants of said parish of Trinity church in said city."

Fourth. And plaintiff includes in this complaint by its title, the "Act for making such alterations in the charter of the corporation of Trinity church as to render it more conformable to the constitution of the state, passed 17th April, 1784."

Fifth. And plaintiff cites especially and certainly as a part of this complaint "the constitution of the state of 1777," to wit, section 36: "and be it further ordained, that all grants of land within this state made by the king of Great Britain, or persons acting under his authority, after the 14th day of October, 1775, shall be null and void, but that nothing in this constitution shall be construed to affect any grants of land within this state made by the authority of the said king or his predecessors, or to annul any charter to bodies politic by him or them made prior to that date."

Sixth. And plaintiff says and includes, especially, in this complaint, that on the allegation, as set forth in said act of 17th April, 1784, that a council appointed by the legislature on 23d October, 1779, "upon the petition of sundry persons, styling themselves members of said church, and after hearing sundry other persons claiming to be churchwardens and vestrymen of said church, reciting that there

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was, in the opinion of the council, reason to believe that the dissensions respecting said church might materially endanger the peace of said city, did in effect determine the said places of churchwardens and vestrymen to be vacant, and by their ordinance dated the 12th day of January, 1784, did vest the estate, real and personal, of the said corporation in nine persons therein named," to be retained and kept by them, or any five of them, until such time as further legal provision should be made in the premises.

Seventh. And plaintiff says, that said trustees named in said "ordinance" associated with themselves other trustees, under the act of April 17, 1784, and, either ignorantly or otherwise, neglected "entirely to carry into practical effect the spirit, meaning, or intent, or the provisions of said act, to render the charter of Trinity church more conformable to the constitution of the state."

Eighth. And plaintiff says, that said trust estate has been diverted more and more continually to this day from the purposes of inhabitants of the city of New York, who endowed said parish church, and were corporators thereof; and defendants are accessory after the facts, and personally continue and threaten to continue to divert said trust estate from the purposes of the founders of said corporation of Trinity church, and greatly injure plaintiff thereby, to wit, as herein specified.

Ninth. And plaintiff says that the purposes of the founders of the corporation of Trinity church was to prevent the increase of vice and immorality in the city of New York, and not merely to support the parasites of any sect.

Tenth. And plaintiff says that the jewish rabbi and his congregation contributed funds to build the original parish church of Trinity, in said city.

Eleventh. And plaintiff says he is of the same faith, baptism, and communion, to the best of his knowledge and belief, as the wardens and vestrymen of Trinity church corporation were on the 4th of February, 1714, to wit: John

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Johnson, John Roosevelt, David Jamison, Oliver Teller, Johan Jansen, Cornelius Clopper, Jacobus Kip, John Cruger, Gerrit Kettletas, Jacobus Bayard, Stephen Buckenhoven, Abraham Wendell, Jacob Bennet, Isaac Decker, John Meyer, Henry Vanderspeigel, Anthony Rutgers.

Twelfth. And plaintiff says he is a protestant, a trinitarian, and a believer in the doctrines of the Christian communion, as established by the synod or ecumenical council of Dort.

Thirteenth. And plaintiff says that he has taken the sacrament in a chapel of Trinity church, in said parish, in good faith, and without any reference to the present action, before said defendants admitted the services of the Greek church communion in Trinity church, in said parish.

Fourteenth. And plaintiff says he is, and long has been, ready, willing, and anxious, being a protestant minister of the gospel, and without a church edifice, to preach in said parish church, the same as the ministers of the church of England, as by law established used to preach alternately with the Reformed Dutch church minister in their church in Nassau street in said parish, before the first rector of Trinity church had any church erected, and said defendants have refused parishoners of said parish this privilege when requested to allow it.

Fifteenth. And plaintiff says he is ready, willing, and anxious, to do and perform every act and thing necessary and proper for him to do to secure all his rights, liberties, franchises, and endowments, as a corporator and successor of the ancient inhabitants of the city of New York, who founded and endowed said parish church corporation.

Sixteenth. And plaintiff says that the trust estate in possession of said defendants and their associates, styling themselves "the rector, churchwardens, and vestrymen of Trinity church in the city of New York," consists of lands in said city, anciently described as the "King's Farm and Garden," and a grant made by Wouter Van Twiller to Anneke Jants and Roeloff Jansen, her first husband, for

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eminent services, said grant consisting of sixty-two acres, Dutch measure, situate next north of said farm and garden, and south of Christopher street, and between Hudson River and Broadway, on the west and east in said city; also the parish church site and edifice, as described in said original charters of 1697, and 1704; also of a cemetery on the island of Manhattan in the way of the city's growth, to wit, between 153d street on the south, and 155th street on the north, and Tenth Avenue on the east, and Hudson River on the western boundary thereof, purchased by proceeds of the sales of said farm, garden, and grant; also of bonds and mortgages derived from said real estate, as more particularly described in a public document on file in the state library in Albany, entitled "Reports of the Select Committee of the Senate on affairs of Trinity Church, with the testimony relative thereto. Albany, Van Benthuysen, printer, 1857," which document, in so far as it describes said property, is ready to be produced as a part of this complaint, as this honorable court may direct.

Seventeenth. And plaintiff says that said defendants and their associates conspiring with them, and who when better known will be included as parties defendant in this action as this court may direct, are wasting and have wasted, and as plaintiff believes are intending to waste the trust estate in their hands, to the great loss, damage, and injury of plaintiff and his associates, who may also be joined as parties plaintiff with him, on motion as this court may direct. Such waste plaintiff believing being in contravention of the intention of the contributors to the trust estate in the hands of said defendants and their associates—that is to say; in seeking to acquire and establish a "political weight," and boasting thereof; in having threatened the legislature of the state with contempt when called to account for their stewardship of said trust estate; in having neglected to provide for the poor of the parish, while pampering the pride of the worldly-minded, and laying up treasures on earth in

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bonds and mortgages, held over Episcopal churches; in said Morgan Dix, defendant herein, preaching that "protestantism is a failure;" also, "that Luther perceived he had committed a gigantic error in advocating the scriptures alone as a means of salvation, knowing well that the authority of the church was the instrument that should decide controversies of faith;" and also, "that protestantism, as a moral system, is stamped as a failure," to wit, in the parish of Trinity church, in the city of New York, in the year 1869.

Eighteenth. And plaintiff says, that the said William E. Dunscomb and his associates, pay out of the revenues and endowments of said parish church, a stipend or salary for preaching such blasphemies, and is accessory thereto.

Nineteenth. And plaintiff says, that the said Morgan Dix, defendant herein, preaches in said parish, "that while denying the dogma of the immaculate conception, any form of catholicism is better than the private judgments of the protestants who effected the reformation."

Twentieth. And plaintiff says, that the said defendants, denying as aforesaid the communion of both Roman catholics and protestants, have admitted into said Trinity parish church the services of the Greek communion.

Twenty-first. And plaintiff says, he is informed and believes that said defendants are receiving, and wasting as aforesaid, an income of about eight hundred thousand dollars by the year more than is allowed under the act of April 17, 1784, or any act of any succeeding legislature of the state of New York.

Twenty-Second. And plaintiff says, that the said Morgan Dix, defendant herein, advocates the establishment of houses of ablebodied young women in said parish by means of the said surplus revenues, and the said William E. Dunscomb, defendant herein, connives thereat, and is accessory thereto.

Twenty-third. And plaintiff says, that the said defendants

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have allowed vice and immorality to increase in said city, and have established no effectual means to prevent Church street and houses of ill fame in the lower part of Greenwich street from being more and more scandalous, the more and more said defendants and their predecessors have departed from the protestant faith and baptism of the founders of the trust estate in their administration.

Twenty-fourth. And plaintiff says, that by the conduct of the defendants and their associates, as hereinbefore specified, he is in danger of the final loss of all his liberties, rights, franchises, endowments, or properties, which belong to him as such corporator of the corporation of Trinity church, as chartered June 27, 1704, plaintiff being advised by counsel and verily believing that by such acts of defendants and their predecessors the property and endowments of said corporation fall to the poor of the parish of said Trinity church and city, according to the practices of the realm of England.

Twenty-fifth. And plaintiff says, that said defendants constantly assert that they will never admit that they have any obligation resting on them under the fifth section of April 17, 1784, to restore to the heirs of Anneke Jants the grant of sixty-two acres, Dutch measure, made by the Dutch governor, Wouter Van Twiller, and their possession, and never will restore the same.

Twenty-sixth. Wherefore plaintiff demands judgment, and prays that an order may be made herein by this honorable court appointing a receiver, with the usual right, power, and authority of receivers in such cases made and provided, to whom the said trustees, defendants herein, and their associates, calling themselves "the rector, churchwardens, and vestrymen of Trinity church, in the city of New York," may be compelled to account for all the proceedings in the premises, subject to such other and further orders as this honorable court may direct.

DAVID GROESBEECK, .

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City and County of New York, ss. :

David Groesbeeck, the above named plaintiff, being duly sworn, says, that he has read the above amended complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein contained and stated on information and belief, and as to those matters he believes it to be true.

DAVID GROESBEECK,

Sworn to before me, this 18th day of March, 1869. VINCENT CLARK, *Notary Public in and for the city and county of New York.*

(Title of Cause.)

Demurrer.

The above named defendants demur to the amended complaint of the plaintiff in this action, and specify the following grounds of objection thereto :

First. That it appears upon the face of said complaint that there is a defect of parties defendant, in the omission of the corporation therein stated to have been incorporated by the name of *the rector and inhabitants of the city of New York in communion of the church of England as by law established.*

Second. That the said complaint does not state facts sufficient to constitute a cause of action.

G. M. OGDEN,
Defendant's Attorney.

Points for defendants on demurrer.

I. As to the first ground of demurrer.

Defect of parties defendant in the omission of the corporation "the rector and inhabitants of the city of New York, in communion of the church of England as by law established."

This is the corporate name of the corporation according to the complaint, and to two acts of the legislature in the complaint referred to. Subsequent acts changing the name

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are not referred to in the complaint, so that the defect appearing upon the face of the complaint is that herein mentioned.

Plaintiff bases his right to bring this action upon the fact of his being a corporator, or at least a successor of some persons who were corporators to this corporation, of his religious tenets agreeing with those of certain persons who were once wardens and vestrymen of said corporation, of his willingness to preach in the parish church of said corporation and to do whatever may be necessary and proper to secure his rights as a corporator. Also, upon his having taken the sacrament in a chapel of said church.

The matters of which plaintiff complains are the diverting the property of the corporation from the purposes of the original founders thereof, and the refusal to allow plaintiff to preach in Trinity church.

The relief demanded is the appointment of a receiver, and though the prayer does not state of what property a receiver is desired, it is not possible to suppose that the property of the corporation is not meant, there being none other mentioned in the complaint.

These considerations make it evident that the corporation is a necessary party to the proper determination of the controversy. If the plaintiff desires to establish his claim to be a corporator, or to preach in the parish church, or to have a receiver appointed to take charge of the corporate property, he clearly cannot have any such relief in an action against two persons who, as far as appears by the complaint, are not members of the corporation at all.

Again, the property is described as being in the possession of the defendants and their associates, styling themselves the rector, church-wardens, and vestrymen of Trinity church. It is not alleged that they are not entitled to these offices, and if they are so entitled, their possession and acts are those of the corporation, and the corporation is the party to be held responsible for them. By implication their title to the

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offices is admitted, their predecessors being spoken of, which is equivalent to admitting that defendants have succeeded to the offices. •

Defendants being, by the supposition of the complaint, possessed of certain property not in their own right but in the right of the corporation, ought not to surrender it to a receiver without having the corporation before the court to defend its rights in the case.

II. As to the second ground of demurrer.

Failure to state facts constituting a cause of action.

None of the acts or omissions charged in the complaint are the subject of an action.

It is not alleged that it was the duty, or in the power, of defendants to provide for the poor of the city, or to prevent Church street from being scandalous, or to do any of the other things which they are charged with having left undone.

On the other hand, the sermons of the defendant Dix, and his schemes for the establishment of houses of mercy, and such institutions, are not matters which can be inquired into by a civil court.

So, also, seeking to acquire "political weight," and "threatening the legislature with contempt," are not wasting the church property.

Neither is there any thing in the complaint to show that plaintiff had a right to preach in Trinity church, or that defendants had any power either to permit, or prevent it.

In conclusion, the whole case of the plaintiff fails by his omission to show that he has any interest in the subject-matter of the action. The qualifications of corporators are plainly stated in the act of April 17, 1784, and plaintiff does not allege that he possesses them.

III. As to the question of granting leave to amend—

This is a matter wholly in the discretion of the court, and if the court is satisfied that the plaintiff's notions as to his rights and remedies are wild and absurd, it will act the part

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of kindness in dismissing the complaint altogether. Plaintiff has already been compelled, by order, to make his complaint definite and certain, and it now appears definitely and certainly that he has no ground for bringing the defendants into court at all.

As to the effect of a demurrer in admitting the allegations of the pleading demurred to—a demurrer is only a technical admission, and does not involve a confession which is, in any way, damaging to the character of the parties.

Even technically, a demurrer admits nothing but what is material and well pleaded.

Such allegations as mostly compose the complaint in this action, are not admitted by the demurrer, because they are immaterial. Some, such as that in the eleventh paragraph, because badly pleaded.

Conclusions of law are not admitted by the demurrer, such as the charges of diversion and of waste. Only facts are admitted.

Above all, statements not in the complaint at all are not admitted, though they may be made by the plaintiff's counsel; those, among others, about establishing disreputable houses; twenty-six persons claiming to be the corporation; refusing Bishop Wainwright a list of corporators, &c.

As to the charge that defendants have departed from the protestant faith and baptism—

This is intended to sustain the charge of diversion of the trust estate from the purposes of the founders. If the purpose of the founders were to suppress vice and immorality, it is plain that to adhere to the protestant faith and baptism was not necessary for that purpose. But if the purpose was rather, as the charter shows, to establish a parish church in communion with the church of England, then it should be alleged that the protestant faith and baptism were those of the church of England. This is not alleged, and is not admitted by the demurrer.

Neither is this a universally admitted fact of history, or

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legal truth. Without entering into theological discussion, it is pertinent to remark—

That the church of England holds the catholic faith to be necessary.

That it does not use the word protestant.

That it acknowledges one baptism for the remission of sin.

Also the authority of the church in matters of faith (21st article).

Luther is esteemed as a saint among protestants, but is not in the calendar of the English church, as are St. Peter, St. Clement, bishop of Rome; St. Boniface, bishop of Rome; St. Sylvester, bishop of Rome; and St. Gregory the great.

As to the synod (ignorantly called by the plaintiff the ecumenical council) of Dort, counsel for plaintiff wholly misrepresented it. It is perfectly notorious that it never pretended to settle the doctrines of the Christian communion, but only some miserable controversies between Calvinists and Armenians. Certain representatives from England were present at the synod, but without power to commit the church of England to any thing. The decrees of the synod were never accepted in England, and were vigorously opposed both by the king and the archbishop of Canterbury.

Other charges of the complaint.

The other charges in the complaint, from the seventeenth paragraph to the end, which together are supposed to make up the great offense of diverting the trust funds from the purposes of the founders may summarily be disposed of. Supposing them true, they do not in any way affect the estate, if we except the statement in paragraph eighteen, that a "salary" is paid for preaching blasphemies. Statements in pleading must be taken as strongly as possible against the party making them. This statement does not necessarily imply any more than that the salary which is due on account of services generally is not withheld on account of

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the alleged blasphemies. There is nothing wrong about this. Even if what was preached on two or three occasions had been plainly heretical, the treasurer of the corporation would not have been called upon to stop paying the salary.

The charge of the twenty-second and twenty-third paragraphs must also be construed strictly, and so construed there is nothing in them.

As to the income of the corporation, if that be excessive, it is not for the plaintiff to complain. His learned counsel might have taken some action on the subject when he was attorney-general, but it is too late for him to do so now.

As to the non-joinder.

Plaintiff says he does not sue the church, or seek to take its property away from it, but he does seek to take it away from the present trustees, who are elected by and represent the whole body of corporators, and to put into the hands of others not so elected. This is a thing about which the corporation has a right to be heard.

How preposterous it would be to sue two of the directors of a railroad company, and seek in that suit to have a receiver appointed to take charge of all the affairs of the road, or for one of the two *cestui que trusts* to sue for the removal of the trustee without joining the other *cestui que trusts*.

To conclude, the complaint does *not* show—

That the plaintiff is a corporator, or

That the affairs of the corporation have been mal-administered.

It *does* show.—

The existence of a corporation, which is vitally interested in the questions raised in this action, and is therefore a necessary party to their determination.

G. D. L. HARISON, *of counsel*.

Points for plaintiff in opposing the demurrer.

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The defendants have demurred to the complaint on two grounds :

First. For non-joinder of parties.

Second. That the complaint does not state facts sufficient to constitute a cause of action.

The first ground is clearly untenable, because—

First. The complaint gives the names of the only parties known, but asks that when the other parties are discovered they may be made parties defendant to this suit. This is all that the plaintiff could or can do.

The rule of pleading *before the adoption of the Code* required that the *party demurring* should give the names of the parties alleged to have been omitted, to enable the plaintiff to have all the parties before the court by an *amended declaration*. The Code, by abolishing the *form* of pleading, has not abolished this principle.

Second. A demurrer does lie for a non-joinder of parties. (*Peabody* agt. *The Washington Mutual Ins. Co.*, 20 *Barb.*, 339).

Third. Section 144 of the Code authorizes the defendants to demur to certain specified cases, but he must be confined to the cases thus specified. (*Sanborn* agt. *Loft*, 8 *How.*, 234).

Fourth. It is not good cause of demurrer that there are too many plaintiffs or too many defendants.

Fifth. A demurrer to a complaint for a defect of parties cannot be sustained for want of parties if the court can determine the controversy before it without prejudice to the rights of others, or by saving their rights. (*Supreme Court*, 1850, *Wallace* agt. *Eaton*, 5 *How.*, 99).

Sixth. An improper joinder of parties plaintiff is not a subject of demurrer. (*Code* sec., 144; *Lewis P. Allaire et al.*, agt. *The City of Buffalo*, decided in *Court of Appeals*, *June Term*, 1868).

Defendant's second ground of demurrer is, that the complaint does not exhibit sufficient cause of action. The

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answer to this might be simply a demand on defendants to answer what single wrong it is probable for trustees to commit, and plaintiff will undertake to show that defendants represent those who have been guilty of such wrongs, and are accessories, and that it is charged or implied in the declaration. They were charged in the complaint, of which the present is an amendment, that as trustees under the act of 1784, they were required to render the charter of Trinity church as it existed, subject to the control of the bishop of London, more conformable to the constitution of the state of 1777, section 36 of which preserves all old charters according to the doctrine of *ses pres.*, that is to say, as near to the ancient charter as is possible, without violation of our constitution. And plaintiff charged in general terms that the defendants, as such trustees, had done those things they ought not to have done, *had been guilty of misusers*, and had left undone those things they ought to have done, had been guilty of non-users, and there was no cure in them. Defendants do not deny a word, but demand specifications of particular charges, and especially that the plaintiff shall show how he is a corporator of the corporation, on whose behalf, or for himself he prosecutes, and that he should show wherein he is injured. This he has done in the present amended complaint, and it is not denied but admitted, nor do they dare to deny it under oath.

And defendants admit that they are trustees, and required to carry out the act of 1784, to render the corporation more conformable to the constitution of 1777.

Plaintiff charges that all of the inhabitants of the city contributed to build Trinity church, and the parsonage, and to pay the rectors, and the constitution requires that those who have advanced money for any purpose shall have that purpose effected or that the money shall be returned, since private property cannot be taken for public use, and much less for a close corporation (such as has been in fact created,) without due *process of law*, or *just compensation*.

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Here is the gist of the action. We charge that the money was given by all tax-payers to prevent the increase of vice and immorality in the city of New York, "and not to support the parasites of any sect, and, least of all, for political purposes under the garb of religion. But instead of heeding this, as we charge, they boast of their political weight," when called to account, and attempt to crush the *right of private judgment* on religious matters.

That they break the law of mortmain, and refuse to stand accountable under the fifth section of the act of April 17, 1784, for the property taken by force and fraud from the Bogardus heirs; and that they allow houses of ill fame to exist in Church street, and contemplate the establishment of houses of able bodied young women in contradistinction to assisting the poor and weak, for we do not put a scandalous interpretation on this; but inasmuch as a corporation has no discretionary powers, it makes void a charter to even do more good than is expressly allowed by a charter, least it should become too powerful. On this point, says Mr. Webster, the following rule of law is settled. "The specification of certain rights operates as a restraint to such objects only, and is an implied prohibition of other powers. (18 *Johns.*, 382; 2 *Cow.*, 709; 9 *Wend.*, 384; *Runyan*, agt. *Carter*, 14 *Peters*, 122; 8 *Com. Rep.*, 247; 5 *Com. Rep.*, 391; *Beatty*, 29, 8, 7; 2 *Dallas*, 316).

The last reference is in support of the rule stated as follows: "A statute should never have an equitable construction in order to overthrow or divert an estate, and every statute derogatory to the rights of property, or that tends to take away the estate of a citizen, ought to be strictly construed." But we charge also that they hold a much larger estate than the law or constitution of either England or the state of New York allows, and that it gives great "pre-eminence" in power to purposes at war with the purposes of the founders of the charity.

Plaintiff's counsel (Roosevelt) referred to the case of

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Miller et al. agt. *Gable, et al.*, as to the property of the German Reformed church in Forsyth street, in which the worshipers became dissentient among themselves as being in point.

In that case the doctrine of the English and American courts was stated as follows, by the assistant vice-chancellor, and sustained at length in the court for the correction of errors:

"I discard the factious doctrine that the majority for the time being is to govern. I hold I am bound to interfere upon the complaint of a single worshiper in the church against a thousand others.

"*Provided, first.* That the property was dedicated to a certain legal purpose, &c.

"*Second.* That it is certain the possessors of the property are violating these purposes."

This, as I apprehend, settles the point as to the non-joinder of parties.

In the case of the *Attorney-General* agt. *Pearson* (§ *Merivale*, 409), which Mr. Justice NELSON accepts as the rule also in our courts, by reference thereto in the case of *Field* agt. *Field* (9 *Wend.*, 401), Lord ELDON holds it is settled (*p.* 400), "that where a congregation becomes dissentient among themselves, the nature of the original institution must alone be looked to as the guide for the decision of the court.

"And to refer to any other criterion (as to the sense of the existing majority) would be to make a *new institution*, and is altogether beyond the reach, and inconsistent with the duties, of the court."

In support of this rule the cases of *Craigdale* agt. *Aikman*, (1 *Dow. P. C.*, 1), of *Foley* agt. *Wouter* (2 *Jacob & Walk.*, 245), of *Leslie* agt. *Burrey*, (2 *Russel*, 114), of *Davis* agt. *Jenkins* (3 *Ves. & Bea.*, 114), of *Milligan* agt. *Whitehall*, (*Milne & Craig*, 72, and *Milne & Keen*, 446); the *Dart-*

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mouth College case also (4 *Wheat.*, 578), follows the same principles.

The *Lady Hewley case*, or, as it is known in the books as, *Attorney-General agt. Share* (7 *Simons*, 309), is the leading authority in England. It is stated by Lord SUGDEN in the *Attorney-General agt. Drummond* (1 *Connor & Lawson* 210). It was first decided by Sir LANCELOT HADWELL, vice-chancellor; affirmed by Lord LYNTHURST, chancellor, assisted by Baron ALDERSEN and Mr. Justice PATERSON; and, in 1842, affirmed in the House of Lords, so that it comes armed with the whole judicial force of England.

In the amended complaint the original purpose of the charity is referred to, and the means of accomplishing its purpose as laid down in the charter also referred to as the parish system of London, in which all who pay scot and lot may vote for wardens and vestrymen, and govern the rector when indolent or intolerant; which is the very best system of church government ever invented by man, and which, it is very manifest, has not been established in the city of New York, while a close corporation has been, and which has set not only the law of mortmain, embraced in the *Magna Charta*, but also our own laws and constitution, at defiance, and deprived plaintiff of every right, under the ancient charter, which he might have enjoyed were this yet a British province.

As to the charter of 1814, we hold it as obtained by a breach of trust and void, and decline to recognize it at all in the declaration.

Respectfully,

CLINTON ROOSEVELT,

Of counsel for plaintiff.

MCCUNN, J.—The above is the amended complaint in this case. The plaintiff asks for a receiver.

The defendants interpose a demurrer:

First. They say: "That it appears upon the face of the complaint that there is a defect of parties defendant, in this

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the omission of the corporation therein named, to wit: the rector and inhabitants of the city of New York in communion of the church of England as by law established."

"*Second.* That the said complaint does not state facts sufficient to constitute a cause of action."

A demurrer to a pleading admits all the material facts stated therein, but alleges that those facts, in law, do not constitute a cause of action, and submits that question, and that question alone, to the judgment of the court. A demurrer admits all the allegations, but it admits nothing but what is material and well pleaded; consequently, such allegations as compose this complaint, they being all immaterial, are not admitted. Moreover, a demurrer is only a technical admission, and does not involve a confession; consequently, the demurrer herein is not, in any way, damaging to the character of the defendants. Again, conclusions of law are never admitted by a demurrer; consequently, the charges of waste and diversion, and that the defendants have departed from the protestant faith, contained in the pleadings before me, being conclusions of law, are not admitted.

In regard to the non-joinder of parties. It is sought by this action to take away the property of the church and corporation. It will be seen by the complaint that the only defendants named in the suit are Mr. Morgan Dix, one of the clergy of the Trinity church corporation, and Wm. E. Dunscomb, Esq., one of the counsel to said corporation. The corporation is not made a party, and yet the plaintiff seeks to take from it its property, and put the same into the hands of receivers.

Emphatically this cannot be done without the corporation being first heard, after having been made a party. How preposterous it would be to sue two of the directors of a railroad company individually, and seek, in that action, to have a receiver appointed to take charge of all the affairs of the road; or for one of two *cestui que trusts* to sue for

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the removal of the trustee without joining the *cestui que trusts*.

The legal estate of every corporation is vested, not in the individual corporators, but in the corporation itself; the estate, however, is a trust for the benefit of the corporators. By the wise policy of the law, corporate bodies are forbidden to be seized to a use, but, by a like policy, the law permits them to be vested with a trust. Hence, if these two defendants actually have an interest in the estate of the corporation of Trinity church, it can only be as *cestui que trusts*. (2 *Bac.*, 11; *Sanders on Uses*, 227; 1 *Vesey*, 467, 536.)

The complaint shows—and it is about the only fact it does show—the existence of a corporation, and that such corporation is vitally interested in the question sought to be raised in this controversy. It is, therefore, a necessary party to its final determination. These considerations make it evident that the corporation must be a party to the proper determination of the controversy. If the plaintiff desires to establish his claim to be a corporator, or to preach in the parish church, or to have a receiver appointed to take charge of the corporate property, he clearly cannot have such relief in an action against two private individuals who, as far as appears by the complaint, are not members of the corporation at all. Again, the property is described in the complaint as being in the possession of the defendants and their associates, styling them “the rector, churchwardens, and vestrymen of Trinity church.” It is not alleged that they are not entitled to these offices; and if they are so entitled, their possession and acts are those of the corporation, and the corporation alone is the party to be held responsible for them. By implication in this pleading their title to the offices is admitted, their predecessors being spoken of, which is equivalent to admitting that defendants have succeeded to the offices. Defendants being, by the supposition of the complaint, possessed of certain property not in their own right, but in

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the right of the corporation, ought not to surrender such property to a receiver without having the corporation before the court to defend its rights. The defect of parties is the omission of the corporation. "The rector and inhabitants of the city of New York in communion of the church of England, as by law established." This is the corporate name of the corporation according to the language of the complaint, so that this defect appearing upon its face, the first ground of demurrer is well taken.

As to the second ground, that the complaint does not state facts sufficient to constitute a cause of action. The allegation that the defendants have departed from the protestant faith and baptism was, I suppose, intended to sustain the charge of the diversion of the trust estate from the design of the original corporators. Now, if the object of the founders of Trinity church was to suppress vice and immorality, it is very plain to all that to adhere to the protestant faith and protestant form of baptism is not at all necessary for that purpose.

The charges in the complaint from the seventeenth paragraph to the end make up the offense of diverting the trust funds from the purposes of the founders. Now supposing them true, they do not in any way affect the estate, if we except the statement in paragraph eighteen, that a "salary" is paid for preaching blasphemies. Statements in a pleading must be taken as strongly as possible against the party making them. This statement does not necessarily imply any more than that the salary, which is due on account of services generally, is not withheld on account of the alleged blasphemies. Even if what was preached on some occasions had been plainly heretical, the treasurer of the corporation would not have been justified in stopping salaries. The remedy to prevent preaching heretical doctrines is of another kind, and to be applied for in a different way. There is nothing in the charges of the twenty-second and twenty-third counts. They must be construed strictly and

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when so construed they amount to nothing. In regard to the allegation that the income of this corporation is very largely in the excess of its charter (\$800,000 per year). The answer to that is simple: *this court cannot provide a remedy*. Application in such case must be made to the attorney-general. Again, the plaintiff bases his right to bring this action upon the allegation of his being a successor of some persons who were, some hundred and seventy years since, corporators of this corporation;—of his religious tenets agreeing with those of certain persons who were living some hundred and fifty years since, and who were supposed to be wardens and vestrymen of said corporation;—of his willingness to preach in the parish church of said corporation, and to do whatsoever may be necessary and proper to secure his rights as a corporator;—also upon his having taken the sacrament in a chapel of said church. Now all this is very bad pleading, because it does not show, or attempt to show, how he became a corporator or a successor of a corporator. As to his willingness to preach in “Trinity parish church,” I have no doubt whatever in regard to such willingness. Nay, more, if such willingness were good cause of complaint, or if such condescension on the part of plaintiff could be made the basis for a good count upon which to sustain an action, that there are many of the clergy in the different protestant denominations who would most willingly condescend in like manner to preach in Trinity church. Indeed, I am afraid if such were the case, and this court had jurisdiction over the subject-matter, there would be no end of actions against the corporation. Apart from all this, however, he does not state a single fact showing, that he, plaintiff, had a right to preach in Trinity church, or that defendants had any power either to permit or prevent him from so preaching.

It is not alleged that it was the duty or in the power of the defendants to provide for the poor of the city, or to prevent Church street from being scandalous, or to do any of the

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other things which they are charged with having left undone. As to the scheme of the defendant, Dr. Dix, for the establishment of houses of mercy and the like, these are not matters which can be inquired into by this court, nor can the seeking to acquire "political weight," and threatening the legislature with contempt, be considered a wasting the church property.

Numerous cases are cited by counsel for plaintiff, not one of which bears in the slightest degree on the questions raised by the demurrer. Indeed, if all the sound law was gleaned from such citations, it would be insufficient to give even a patchwork construction upon which to build the wild and constrained theories indulged in this complaint.

Perhaps, from viewing doubtful cases in this light, a habit of false construction of all cases, sounding in name like the one under consideration by them at the time is, unawares, formed by some counsel, and predilections in their minds sort the tangled heap of decisions into a desired shape to suit their purpose long before plodding patience after truth and good law has addressed itself to the task. From this temptation, it is feared, the counsel for the plaintiff has not wholly escaped, because how else could he have cited long quotations from such cases as "*The Lady Hewley case*, (7 *Simons*, 309;) *Field agt. Field*, (9 *Wend.*,) *Attorney-General agt. Drummond*, (1 *Conor & Lawson*,)" and many others, not a line of which applies to the case in hand—cases containing the history of the controversies between different parts of individual protestant sects, and not having the slightest bearing on the point before us.

There is another and a very grave objection, and, I hold, a valid reason in law why this plaintiff should not be listened to.

Before a suitor can claim the interposition of a court of justice, either in law or in equity, he must have some wrong to remedy, some grievance to redress, or some claim to enforce. It is for accomplishing these righteous objects

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courts of law and courts of equity are organized. They are not, however, to be used as the resorts of the disappointed, the malignant, or the foolish. They should be, and I trust are, the tribunals wherein disputes between man and man are fairly, justly, and humanely disposed of; and as the very basis upon which to grant that justice, the first question, absolutely the very first, that is presented to the mind of any court in any litigation is, whether the party invoking the majesty of the law is entitled to relief, and whether he has justly and fairly placed himself in a position to claim the judgment of the court whose justice he solicits, because if he has not, then there ends the inquiry. Now, applying these general legal principles to the subject matter before us, the question first presented to us is. Is this plaintiff entitled to the remedy he seeks, and has he placed himself in a light so as to enable him to demand of our hands such a remedy? Absolutely we say he has not. Let us look at his position. On the 6th day of May, 1697, William III., through governor Fletcher, then captain-general of the province of New York and territories, granted to Trinity church (the foundation and spire of old Trinity church being then built) a charter under the corporate name of "the rector and inhabitants in communion of the church of England as now established by our laws" (*See charter line, 100*). The charter, among other things, provides that the parish shall be named "the parish of Trinity church" (*Charter, line 145*). The charter also describes what lands shall go with the enclosure of the church for grave-yard purposes and the like. After defining what the duties of said corporation shall be, it declares (*line 565*) that "the said rector and inhabitants in communion," &c., shall nominate and appoint such people of said parish as they shall think fit, and *shall be willing to accept the same, to be members of said church*, and be entitled to vote at the annual elections for churchwardens and vestrymen of said corporation. Thus the charter stood so far as the admission of members to said church was

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concerned, and also so far as electing officers, &c., until 1814 (some slight alterations excepted), when, among other things, it was enacted that "all male persons of full age, who for the space of one year preceding any election shall have been members of the congregation of Trinity church aforesaid, or any of the chapels belonging to the same and forming part of the same religious corporation, and who shall hold, occupy, or enjoy a pew or seat in Trinity church, or in any of the said chapels, or have partaken of the holy communion therein within the said year, and no other persons, shall be entitled to vote at the annual election for the churchwardens and vestrymen of the corporation."

Now, this section was intended as explanatory, and as a direction for those who were entitled to vote for officers of said church; and plaintiff claims that because a part of this section declares that any person who has partaken of the holy communion within one year shall be entitled to vote, and that as he entered said church as a stranger, and not a member of said communion, and formally partook of the communion in Trinity chapel, without any previous probation or preparation, and without the priest who administered the sacrament consenting or even knowing who he was, that consequently he is entitled to vote at the election of such officers. This would be an *odd* doctrine indeed. That a stranger, a member of an entirely different religious persuasion, can vote, is simply preposterous. With the same propriety can a resident of Philadelphia, a strange, a bad man, indeed an alien to this country, come to this city, register his name, and vote at our elections. The proposition is too absurd for serious entertainment. What is meant by this section of the amended charter above cited is simply this: That any just and good man who had properly prepared himself for the holy communion, and who had been duly and properly accepted by the rector into the church as a true and good communicant, could vote at the election for the officers of said church, and have all the rights and bene-

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fits accruing from the corporation ; this is what was intended by that section, and what was meant by it, and nothing else. It did not mean, and cannot by any tortured form of construction, mean, that any adventurer, for the purpose of causing litigation and for the express purpose of acquiring wealth, could enter said church and wickedly go through the form of a communion and be called a member, and that for the purpose, as it would seem from the complaint, of harassing its organization. Could folly or wickedness contrive a scheme of spiritual intolerance more wounding to the sensibilities of any religious people, and more to be repudiated by the generous principles of our free institutions ! But again, this plaintiff does not say he is an episcopalian, or a member of the church of England, or of Trinity church, but says he is "a protestant, a Trinitarian, and a believer in the doctrines of the Christian communion as established at the synod at Dort," and that he belongs "to the Dutch Reformed church." It is clear, therefore, if he is a Dortite and belongs to the Dutch church, he is not an episcopalian, or a member of the English church, or a communicant. He says, however, as I have above related, that he took the sacrament in Trinity chapel, and that that act of itself, without being a member of the episcopal community, entitles him to vote. Now, let us see about this. Let us examine the cause which led to the adoption of this law.

The churchwardens and vestrymen of Trinity church, following the example of their English ancestors—their original house being too small—founded two or three other places of worship, and called them chapels of Trinity church. The natural effect of this system was, that this church and its chapels formed one church, their several congregations were knit into one body, and the communicants in each congregation went, on Easter Tuesday, to the poll of Trinity church, and voted for the same churchwardents and vestry-

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men ; and these, by their office, took all the churches under their common government.

As the charter incorporates those who are in communion with the church of England, communicants alone, before the Revolution, were admitted to the privilege of voting for charter officers; and the records of the church furnish no instance of a contrary practice.

At length the episcopalians, by the increased population of the city, were too numerous to be accommodated in Trinity church and its chapels. In this situation, a respectable portion of the episcopalians had recourse to the act entitled "an act to provide for the incorporation of religious societies" (1 *Jones & Varick's Laws*, 104, 109, passed 1784) for relief; and in the year 1793 they began to incorporate themselves under that act into separate churches and societies.

The members of the new corporations, thus organized under the religious societies' act, elect their own churchwardens and vestrymen. They neither hold pews nor seats in Trinity church, nor do they commune in that church or contribute to its support. The vestries of the new corporations appoint their own rectors, clerks, and sextons, and they manage all the spiritual and temporal concerns of their own churches as they please, paying no regard whatever to the vestry of Trinity church.

As a consequence of the new corporations, the congregation of Trinity church consists of those only who attend worship in that church and its chapels, St. Paul's church and St. John's church, and Trinity chapel, the latter having been recently built, as a chapel, by Trinity church.

No members of either of the new corporations ever claimed, or pretended to claim, a right to vote for the churchwardens and vestrymen of Trinity church prior to the election held for those officers in March, 1812. At that election several persons, known to be members of the new corporations, offered themselves as voters, but they were

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rejected, because neither of them was a pew or a seat-holder, or communicant in Trinity church or either of its chapels. After this attempt to vote by outside episcopal communicants, a memorial was presented to the legislature, asking, among other things, for an interpretation of the charter relative to the right of voting.

A bill was accordingly introduced, and in its passage through the houses met with little opposition, except from its presumed interference with the elective franchise; and in the house of assembly it was referred to the attorney-general to report "whether, in his opinion, its passage would, in anywise, defeat or vary any existing rights under the charter, or any acts altering it." The attorney-general reported that he "had examined the charter and the acts altering it, with the bill referred to him, and he was of opinion that its passage would not defeat or vary any existing rights under the acts or charter."

As the claim to vote had a tendency to create uneasiness in the minds of the members of the church, and to excite dissensions among episcopalians in general, one of the objects of the bill was to obtain such an interpretation of the charter as would effectually extinguish the claim. Now, it is common for legislative bodies, in novel and special cases which have eluded the penetration of former legislators, to pass acts, in the nature of declaratory acts, to pluck up discord and litigation by the roots, that general quiet may be promoted. Such acts resemble bills of peace in chancery.

By thus showing that the members of the new corporation are not also members of the corporation of Trinity church, we have put at rest all questions respecting their supposed right to the corporate property.

Members of every corporation have an interest in its estate while they continue members, and no longer. A right to the corporate property is strictly local in its enjoyment. Whenever a corporator removes and settles permanently without the precincts of the corporation, his franchise, *ipso*

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facto, ceases. Thus if an inhabitant of the city of New York quits the city and takes up his residence in the county of Westchester, he relinquishes his rights as a member of the city corporation, and he cannot resume them in any other way than by returning and again fixing his residence in the city.

These principles being indisputable, prove the utter futility of the claim which the plaintiff makes as to his being a corporator, or as to his interest in the estate of the corporation of Trinity church as such corporator.

Whoever reads the act for incorporating religious societies, and reflects upon its provisions, and also upon the freedom of our civil and religious institutions, must be persuaded that the legislature intended that every society incorporated under the act should enjoy a separate and independent existence, and be wholly governed in its spiritual and temporal concerns by officers of its own choice. The act provides that "the persons qualified to vote at elections for church officers shall be male persons of full age, who shall have belonged to the church or congregation for the last twelve months preceding the election, and who shall have been baptized in the church, or shall have been received therein either by the right of confirmation, or by receiving the holy communion, or by purchasing or hiring a pew or seat in the said church, or by some other joint act of the parties and of the rector; that the voters on a certain day in every year shall, by a majority of voices, elect two churchwardens and eight vestrymen; and that the churchwardens and vestrymen so elected shall have power to call and induct a rector as often as a vacancy happens therein, and to take into their possession and management all the temporalities belonging to such church or congregation." (3 R. S., 292.)

Keeping in view the wise intention of the legislature, that the act carefully confines the right of voting for church officers to the persons who shall have honestly belonged to the church or congregation for the last twelve months pre-

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ceding the election, it does not require the gift of prophecy to foretell that if the members of distinct corporations, or strangers, were to possess the right of voting in common for the officers of this church, it would open a door to mischiefs dangerous to all religious societies, and hurtful to the growth of genuine religion. For example, two or more sects might, by combining against another religious body, and by superior numbers on the day of election, force their own creatures into office, and, thus brought into public life, might appoint a clergyman against the decided opinions and wishes of the congregation.

The same creatures might, also, manage the temporal affairs of the congregation in a way destructive of their interests.

The next inquiry is: Whether the members of the new corporations, or a stranger, such as this plaintiff, have a right to vote at the elections of the corporation of Trinity church?

The foundation for the claim of this right is the single circumstance that the charter incorporates "all persons inhabiting or to inhabit the city of New York, and in communion with the protestant church of England."

These general words of the charter, when the real meaning of the grantor is extracted from them, will be discovered not to afford the slightest pretext for the claim of the plaintiff. The charter, like every other grant, must be interpreted with reference to the actual state of things at the time it bears date. Looking from this ground, we shall see that the state, at the date of the charter, was a province of Great Britain, and consequently subject to its laws. The protestant episcopal church was the established church of the mother country; and the crown, in its generosity to the episcopalians in the city of New York, naturally sought to place Trinity church on a footing as similar to that of the church of England as local circumstances would permit. The population of the city at the same period was so incon-

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siderable that the whole number of episcopalians on the island was not sufficient to fill the building already erected for public worship.

On the other hand, the revolution which accomplished the independence of this country, the rapid increase of the population of the city, and the new episcopal corporations which have sprung from the parent church, being out of the reach of human foresight, could not be provided for.

With confidence, then, it may be asserted that the episcopalians inhabiting the city of New York are not all of them parishioners of the parish of Trinity church. Such of them as are members of the new corporations have become parishioners of the parishes attached to them, the legal effect of which is virtually to dissolve their connection with the parish of Trinity church.

It is no less demonstrable that members of the Dutch Reformed church, as this plaintiff is, and who are unaccustomed to take the sacrament in episcopal churches, are not of the communicants intended by the charter.

By the discipline of the English church no person can, at the same time, be a regular communicant in separate parishes under the care of different and independent rectors. The canons of the church particularly direct that "the sacrament shall not be administered by the rector of one parish to the parishioners of another, without the license of the rector of the latter parish, except to travelers, to persons in danger of death, or in cases of necessity." (1 *Burns' Ecclesiastical Law*, 677 and 682).

The rector is authorized, under certain circumstances, to refuse the sacrament even to his parishioners; and to be regular, the parishioners should communicate at least thrice in every year.

The only legal evidence that the parishioner is a communicant is his receiving the sacrament in the parish church, by and with the consent of the priest, and the rector cannot

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take notice of the receipt of the communion in other parishes.

To admit a communicant under any other circumstances would be deemed an offense against ecclesiastical discipline, both in the priest administering and in the parishioner receiving the sacrament; and it is an undeniable position in law that no right can be derived from the commission of a wrong.

Upon these principles it was constantly maintained, before the revolution, that no persons but those who were received or born in the church, and communed in Trinity, or one of its chapels, were entitled to vote under the charter. The third section of the act entitled "an act for making such alterations in the charter of the corporation of Trinity church as to make it more conformable to the constitution of the state," passed 17th April, 1784, embraces the same principles with respect to communicants, by restraining the privilege of voting to such inhabitants of the city "as shall, in the said church, partake of the holy sacrament of the Lord's Supper at least once in every year."

Some contend that this section, by using the words "the said church," refers to the spiritual body of the church, and not to the building of Trinity church; and hence they argue that communicants in any other episcopal church are qualified to vote.

It will much assist our search after the true import of the words, "the said church," if we take the entire section, with its preamble, into consideration, and proceed at once to ascertain the objects for which it seeks to provide.

Bearing in mind the title of the act just quoted, it is worthy of notice that after declaring the manner of inducting the rector, as prescribed by the charter, to be inconsistent with the letter and spirit of the constitution, the act substitutes a different mode of induction, by vesting the churchwardens and vestrymen of the corporation with "full power

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to induct a rector to the said church as often as there shall be a vacancy."

Here the term church leaves no room for inference. By not referring it to Trinity church we torture it into a sense that will defeat the very exercise of the power to induct a rector.

Then comes the following section, with its preamble, which defines the qualifications of the persons who were thereafter to be considered as members of the corporation: "And whereas doubts have arisen on those parts of the said charter and law first above mentioned, which speaks of inhabitants in communion of the said church of England; for removal whereof,

"Be it further enacted, by the authority aforesaid, that all persons professing themselves members of the episcopal church, who shall either hold, occupy, or enjoy a pew or seat in the said church, and shall regularly pay to the support of the said church, and such others as shall in the said church partake of the holy communion of the Lord's Supper at least once in every year, being inhabitants of the city and county of New York, shall be entitled to all the rights, privileges, benefits, and emoluments which, in and by the said charter and law first above mentioned, are designed to be secured to the inhabitants of the city of New York, in communion of the church of England."

It is asked, then, whether the word church, in the section cited, means a building dedicated to divine service; or whether, applying the question more directly to the case in hand, we are to understand by the word the building of Trinity church?

In expounding a statute we are to presume that the legislator used words in their most usual signification—that he had the subject-matter constantly in mind—that all his expressions were directed to a reasonable end—that his train of thought was uniform—and that he intended to infuse into every part of the statute the same spirit.

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By the help of these rules the meaning of the word church will be easily ascertained.

In the first clause of the section before us, the legislator declares that those inhabitants of the city shall be members of the corporation of Trinity church "who shall hold, occupy, or enjoy a pew or seat in the said church."

These words cannot possibly be satisfied otherwise than by interpreting the word church, according to its common acceptation, to mean a building dedicated to the service of God.

The legislator speaks in the act at large of many of the inhabitants of the city as members of the corporation of Trinity church, of the induction of a rector, and of the necessity of altering the charter so as to make it conformable to the constitution of the state. Indeed, the whole subject which engages his mind appears to be that corporation and its charter. It would, therefore, be a very unnatural exposition of the section to apply the word church to any building except one belonging to the corporation of Trinity church; and the more so as Trinity church and its chapels were the only episcopal buildings in the city at the time.

In the second clause of the section the legislator further declares that, "such others" shall also "be members of the corporation as shall, in the said church, partake of the holy sacrament of the Lord's Supper at least once in every year, being inhabitants of the city of New York."

As this clause expressly enjoins it upon the communicants to take the sacrament in the said church, we must, out of decency, admit that a building in which the sacrament might be administered was in the legislator's eye; or else we must attribute to him a want of due reverence for that most holy ordinance.

It cannot reasonably be doubted that the building here also meant by the legislator was Trinity church.

In fixing the qualifications of corporators the legislator

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judged it expedient to give them pews and seats in Trinity church; and this church is the last antecedent to that in which the communicants are to partake of the sacrament. Why, therefore, should we imagine that the legislator in one clause meant to make the holding of a pew or seat in Trinity church an indispensable qualification of membership, and that, in the clause next succeeding, it was his intention to allow the communicants of different churches to be members? Would not this singular change of mind justly expose the legislator to the charge of fickleness? And to this charge might there not as truly be added the serious imputation of wilfully violating the settled discipline and ancient practice of the church, by obliging the vestry of Trinity church to acknowledge as their communicants, men who regularly took the sacrament in churches entirely free from their control.

It follows, as a necessary consequence, that the true meaning of the section under consideration, requires the inhabitants of the city to communicate—I mean honest and pure communication—or to hold pews or seats in Trinity church, in order to qualify them to be members of its corporation. If, in fact, the section stood alone, and doubts arose as to its true meaning, they would instantly be dispelled by construing the section in connection with the title and other parts of the act. The express purposes of the act are to relieve and benefit Trinity church; and wherever the word church occurs, without designation or epithet, it will be found that Trinity church alone is contemplated by the legislator.

Admitting the premises to be true, and the reasoning from them to be just, we shall be authorized to conclude that this plaintiff has no vested rights in the corporation of Trinity church, and of course, that the right of election cannot be “divested or impaired by the limitation provided by the bill,” because—1. This plaintiff is not a parishioner of the parish of Trinity church.

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2. He is not a communicant in that church.

3. He does not hold a pew or seat in that church, or contribute to its support.

Since the days of Henry VIII., the gift of all the clergy in the English church to their livings, or rather the gift of the livings to the clergy, was vested in the crown. This was nominal, however, for the crown always allowed the bishops of the different dioceses to exercise the right of granting livings. (There are exceptions to this rule, where private parties have the gift of livings.) In the charter granted to Trinity church by the crown in 1697, (*charter, l. 225,*) the right as rector in the church in the city of New York was conferred by said charter upon the bishop of London, first; and, after his decease, the power of appointing and installing a rector was to be done as other rectors and parsons were appointed in said English church. The vestry had the right, however, by said charter, to levy and assess from the inhabitants in communion with the church of England to support and maintain said church. In order to make matters in church affairs conform more to the liberal views then beginning to be entertained by the people of the colony, the power, among other improvements, to collate and induct a rector, was, by colonial act of the legislature, passed 1704 and approved by the crown through the then governor, Lord Cornbury (*Van Schaack's Laws, p. 60*), vested in the churchwardens and vestrymen. This was the first improvement in the charter of the church. The next improvement we find was that conferred in the 36th section of the constitution of this state, formed in 1777, which section confirms all the grants formerly given by the crown to the church before 1775. The next improvement we find appended by law to the charter of the church, was that contained in the act of 1784, section 3, where it is declared, among other things, that all persons who pay to the support of the church, or hold or occupy a pew in the same, or who shall partake of the holy sacra-

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ment once in each year, shall be entitled to all the benefits and emoluments of the church. This act also appointed a new set of church hands and vestrymen (1 *Jones & Varick's Laws*, 128). This act annulled all parts of the charter of Trinity church which was inconsistent with the new constitution of this state. The last act above referred to was, by many, thought to deprive Trinity church of its name and title formerly given it by the colonial legislature. A law was, accordingly, passed in 1788 by the legislature of this state (2 *Jones & Varick's Laws*, 346), confirming their old name, or nearly so. This act allowed them to take the corporate name of "The rector and inhabitants of the city of New York in communion of the protestant episcopal church in the state of New York;" and finally, on Jan. 25, 1814, an act was passed which declared, among other things, section 2:

"And be it further enacted, that all male persons of full age, who, for the space of one year preceding any election, shall have been members of the congregation of Trinity church aforesaid, or any of the chapels belonging to the same, and forming part of the same religious corporation, and who shall hold, occupy or enjoy a pew or seat in Trinity church, or in any of the said chapels, or have partaken of the holy communion therein within the said year, and no other persons, shall be entitled to vote at the annual election for the churchwardens and vestrymen of the said corporation."

Now all the several acts and amendments which I have referred to, were passed in order to mould the institutions of the church—Trinity church and others—to suit the changed condition of the government, and to accord with the rapid improvement and progress of the age. And I hold as a principle, that although the legislature has ever been inflexible in its resolution to preserve the inviolability of private property, yet it has from time to time exercised its discretion in moulding the elective franchise of corpora-

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tions into new shapes, the better to adapt it to the changes occasioned by the freedom of our government and the progress of society; the one being considered as a subject too sacred to be touched, and the other as a subject fit to be carefully handled.

In regard to the allegation contained in the sixteenth paragraph of the complaint, it is alleged "that the trust estate in the possession of said defendants and their associates, styling themselves 'the rector, churchwardens, and vestrymen of Trinity church, in the city of New York,' consists of lands in said city, anciently described as 'the King's Farm and Garden,' and a grant made by Wouter Van Twiller to Anneke Jants and Roeloff Jansen her first husband, for eminent services, said grant consisting of sixty-two acres, Dutch measure, situate next north of said Farm and Garden, and south of Christopher street, and between Hudson River and Broadway, on the west and east in said city; also the parish church site and edifice, as described in said original charters of 1697 and 1704."

This court can only say, from a most careful inspection of all the charters, grants and conveyances to said corporation, and set out as a part of this complaint, or referred to therein, that their title to said lands and property seems most indisputable. A brief glance at the muniments of title cited in this pleading, and which vest said property in the church, must convince at once the greatest skeptic of this fact. The Dutch West India Company was founded in 1621, and in 1623 they procured from the Dutch Government a grant, among other things, of all the lands situate on the Island of Manhattan—now the city and county of New York—and about the same time they formally took possession of their property, and then and there established a settlement or town. It was called New Amsterdam. After planting such settlement (1626) they purchased the entire island from the Indians (a tribe called the Manahattoes) for the sum of \$24. In 1664, the English forces under

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Col. Nicolls captured the settlement and all things appertaining thereto, together with the entire Dutch country (New Netherlands) in America, from the Dutch, and held it for several years. The English renamed New Amsterdam, and called it the city of New York, after the Duke of York, King Charles II.'s first brother. In 1673, the Dutch recaptured the island from the English, and held it a few months, and finally, in 1674, when Holland and England made peace with each other, the entire island, together with all other possessions of the Dutch on this continent, was ceded to the English crown. When the Dutch recaptured the city of New York, in 1673, they renamed the town and called it the city of Orange, and during the short time which they retained it in their possession, they established what they called "the reformed Christian religion, conformable to the synod of Dordrecht," prohibiting any other kind of faith therein. (*See 1st Vol. Documentary History of the State of New York, by Dr. O'Callaghan, page 608*). Everardus Bogardus was the first minister of the Dutch church, and to him was assigned by the Dutch West India Company, on which to live, certain lands and tenements as house, glebe, &c.

The church in which he preached was within the precincts of a fort which then stood on the extreme point of the island, where the battery now is. After the English took possession, in 1664, governor Andrews established the English church, known as "the church of England in America," and the first service was held in the church within the fort, in which the Dutch service had formerly been held. The English government did not, as the Dutch had formerly done, prohibit any other form of religion but their own; they allowed all the inhabitants to enjoy their own form of faith. The episcopalians continued to worship in the old fort for some years, until governor Fletcher, the captain-general of the province in 1697, procured for them the charter now known as the charter of Trinity church,

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and also a grant, with the charter, of land running from Broadway to the Hudson River, being the same lands upon which Trinity church and its graveyard attached now stands. This was the first grant to the church. The next grant I find was that in the reign of Queen Anne. This was a grant, in 1705, to the corporation of Trinity church, by deed patent from Lord Cornbury, the then governor of the province. It consisted of a tract of land called the Queen's or King's Farm, lying on the west side of Manhattan Island, extending from where Saint Paul's church now stands to Skinner's road, now Christopher street, and from Broadway to North River. The property is described in the grant as follows: "All those our several closes, pieces and parcels of land, meadows and pastures, formerly called the Duke's Farm and the King's Farm, now known by the name of the Queen's Farm, with all, &c. &c. &c., * * *" bounded on the east partly by the Broadway, partly by the common, and partly by the swamp, and on the west by Hudson's River; and also all that piece or parcel of ground situate and being on the south side of the churchyard of Trinity church aforesaid, commonly called and known by the name of the Queen's Garden (this was called the Dutch Dominie's Bowerie,) fronting to said Broadway on the east, and extending to low-water mark upon Hudson River on the west. * * * (See Wm. Bradford's map, made 1728, now in possession of the court).

Some dispute arose by some of the then inhabitants of New York, about the grant of 1705, saying that it was not valid, and a suit was brought and notice filed; but, for the purpose of ending all litigation and misunderstanding about the same, the entire grant, in 1714, was again confirmed by the Queen through Lord Bolingbroke. (See *Book of Patents*, No. 7, p. 338, *Secretary of State's Office*).

Now these grants cover all the lands about which there is so much said, and to which certain pretended claims are

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laid, none of which, as far as I have seen, have the slightest resemblance of legal fairness.

When the crown made these several grants to the church, it was in the full possession and enjoyment of all the property so granted, and through its governors and officers of law it gave the like possession of all of said property to the corporation of Trinity church, which property has been thus lawfully in their possession until this hour, except such as the church corporation has seen fit to dispose of. These grants have all been confirmed, since the revolution, by the legislature of the state of New York, to the corporation of Trinity church.

A debt is, by the wise policy of the law, outlawed and irrecoverable unless it has been acknowledged by the debtors within six years before suit is commenced. Twenty years' possession, with claim of rightful ownership of land (which the law has always considered the most sacred of all property) is a bar to all recovery by another, let his claim be otherwise ever so just and equitable. Now the fact of this corporation being in the lawful and just possession of this property for over one hundred and fifty years, taken together with the law I have just laid down, should satisfy the most unreasonable mind that the pretended claim set up in the sixteenth paragraph of this complaint is of the most absurd kind.

About this synod of Dort, absurdly called in this complaint, "the ecumenical council of Dort," I regret that I am constrained in any way to refer to the subject; but as the matter has been referred to in the plaintiff's pleadings, and has been made the basis of a count in said complaint, I think some explanation is required as to what this meeting at Dort, anciently called Dordrecht, was. It is a universally admitted historical truth that the church of England holds the catholic faith to be necessary. It does not in any one of its articles of faith use the word protestant, or call itself in the title the protestant church. On the contrary, it calls

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itself the church of England as by law established, and it acknowledges but one baptism for the remission of sins; and in its 20th article it recognizes the authority of the church (English church) in matters of faith. Luther, we all know, is esteemed by protestant dissenters almost as a saint, but he is not recognized in the calendar of the saints of the English church, as are St. Peter, St. Clement, St. Boniface, St. Gregory, and many others. Then the English church observes in some degree as their principal feast-days, Christmas, Easter, Ascension, and Whitsuntide. Now these holydays are all denounced by the assembly at Dort, who were, as the complaint alleges, the founders of the faith or doctrines which this plaintiff, in the twelfth paragraph of his complaint, claims to profess as a faith.

The assembly of men at Dort, ridiculously called in this complaint an "ecumenical council of Dort"—it is notorious to the merest child in history that it was not a council at all. It was a mere gathering of men, a synod of the Dutch Reformed church and some delegates from Scotland, brought together to settle some trifling and miserable disputes between Calvinists, Armenians, Gomarists, and the like. Its decrees or settlements were never recognized by the English church. Indeed, the English people knew nothing whatever of the synod until it was over; and when its proceedings were brought to their knowledge by one or two of James I.'s bishops, who happened to be near the city where the synod was held, the doctrines laid down by that council were quite repudiated both by king and bishops.

Ecumenic, universal—ecumenical council means a universal council, a council of all, not of a part, and is only applied to the councils of the catholic church; whereas the synod of Dort, which the plaintiff improperly calls the "ecumenical council of Dort," was simply a meeting of a few of the presbyteries of the presbyterian and Reformed Dutch churches. The word synod signifies simply a meeting of the few adjoining presbyteries. (*See Walker's*

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Dictionary, also Appleton's American Cyclopædia, vol. 13, p. 553).

In regard to the question of granting leave to amend. This I cannot do, because I am satisfied that the plaintiff's notions as to his rights and remedies are wild, visionary, and absurd; and I think I will be doing an act of great kindness to him in dismissing the complaint altogether. As to the question of costs and allowances, I think my proper course will be to put defendants to their remedy by motion for that purpose. I will say here, however, that I think as the amount claimed to be involved is very large, the allowance should be in proportion, so that those who go to law with this corporation, or any other person or corporation, will see at once that they have at least a probable cause of action, and if they have not, and still persist in notoriety of this kind, they will be compelled at least to pay for such litigation.

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SUPREME COURT.

HORACE BAILEY, respondent, agt. ELI STONE, appellant.

An appeal from the decision of the *clerk* of the court, allowing or disallowing *costs*, cannot be sanctioned. The practice is becoming quite common, but it is wholly irregular and unauthorized. It would be treating the humblest ministerial action as judicial—converting the clerk of a court into a judge, without any color of authority for so doing.

The only duty the clerk is required or permitted to perform, in relation to the costs, is to ascertain and determine what items of costs and disbursements the party presenting costs for adjustment is, by law, entitled to. The question whether he is entitled to any costs in the cause is for the court to determine, not the clerk.

It is the duty of a clerk to adjust any bill of costs presented to him. But unless there is a verdict of a jury, report of a referee, or order of the court, awarding costs to the party presenting the bill to the clerk, it is not the duty of the clerk to insert the costs, so adjusted, in the judgment.

If the party deems himself entitled to the costs in such case, it is his duty to apply to the court for an order requiring the clerk to insert the costs in the judgment.

But if the clerk persists in inserting the costs in the judgment when there is no adjudication entitling the party to costs, the other party to the action must move to strike them from the judgment.

After an adjudication by a justice of the peace that the accounts of the parties exceeds \$100, the plaintiff is bound to commence his action in the supreme court, and is entitled to costs under § 304 of the Code, on the recovery of any amount in that court. *

Fourth Judicial Department, General Term, March, 1871.

MULLIN, P. J., JOHNSON and TALCOTT, JJ.

APPEAL by defendant from an order of special term.

* NOTE—The 3d subdivision of § 304 of the Code seems to be unfortunately worded; it says: costs shall be allowed of course to the plaintiff upon a recovery "in the actions of which a court of justice of the peace has no jurisdiction." Then follows subdivision 4 which says that the plaintiff is entitled to costs of course "in an action for the recovery of money where the plaintiff shall recover \$50." Now in all actions of account for an amount exceeding \$400, or any other action on contract exceeding in amount the jurisdiction of a justice of the peace, subdivision 3 is broad enough to give the plaintiff costs of course, on recovery of any amount, whether the action was ever commenced in a justices' court or not. It covers all actions in which a court of justice of the peace has no jurisdiction. But then sub-

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L. SPRING, *for appellant.*J. S. JOHNSON, *for respondent.*

By the court, MULLIN, P. J.—This is an appeal from order made at the Erie special term, denying motion to set aside order of the clerk of said county, adjusting costs in favor of the plaintiff and against the defendant in this action.

An action for the same cause of action to recover, which this action was brought, was commenced in a justices' court, and it appearing on the trial to the satisfaction of the justice that accounts proved on both sides exceeded \$400, dismissed the plaintiff's complaint on motion of the defendant's counsel, and entered judgment for costs, in favor of the defendant.

This action was then brought, and the trial of the issues joined was referred to a referee who, after hearing the parties, reported that the accounts of the parties proved before him, exceeded \$400, in amount—that there was due from the defendant to the plaintiff, the sum of \$26 14, for which sum judgment was ordered, together with the costs of this action.

A motion in the nature of an appeal from the decision of

division 4 comes in and requires a recovery by the plaintiff of \$50, to entitle him to costs. This is also general, and would seem to operate to annul or repeal subdivision 3. For instance, suppose this case had been originally commenced in the supreme court, and the recovery of the plaintiff had been the same as here—under \$50—the defendant would have been entitled to costs under subdivision 4. Subdivision 3 would have had no force nor effect in that case; and why does it have now? Because the court say that an *adjudication* of the amount of the accounts by the justice of the peace, or by the referee who tried the cause, was necessary to show that the justice had no jurisdiction in order to bring it under the operation of sub. 3. But subdivision 3 does not say that this adjudication is necessary or required—it says “in the actions of which a court of justice of the peace has no jurisdiction”; and this question of jurisdiction might as well be ascertained by the attorney who brings the action, as by a court or referee so far as subdivision 3 gives any authority to determine. Indeed, it has been decided in *Lund agt. Broadhead*, (*ante* 146,) that “if in fact, the sum total of the accounts of the parties exceeds \$400, it is not necessary that the action be first brought in a justices' court, and that the amount of the accounts should be there shown *by proof* to exceed \$400. The jurisdiction of the justices' court, may be shown by the pleadings.”—REP.

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the clerk adjusting costs in favor of the plaintiff was made, and the decision of the clerk was affirmed, and from that order the defendant appeals.

It will be seen from the foregoing statement of the facts appearing in the papers used on the appeal, that there is no dispute between the parties as to the items of costs or disbursements allowed by the clerk, but the claim is, that the clerk erred in allowing the plaintiff any costs, whatever, the defendant claiming that the recovery being for less than \$50, the defendant was entitled to costs, and not the plaintiff.

This practice of appealing from the allowance of costs in a cause, is becoming quite common, but it is wholly irregular and unauthorized. The only duty the clerk is required or permitted to perform in relation to the costs is, to ascertain and determine what items of costs and disbursements the party presenting costs for adjustment is by law entitled to. The question whether he is entitled to any costs in the cause, is for the court to determine, not the clerk.

It is the duty of a clerk to adjust any bill of costs presented to him. But unless there is a verdict of a jury, report of a referee or order of the court awarding costs to the party presenting the bill to the clerk, it is not the duty of the clerk to insert the costs so adjusted in the judgment. If the party deems himself entitled to the costs in such case, it is his duty to apply to the court for an order requiring the clerk to insert the costs in the judgment.

But if the clerk persists in inserting the costs in the judgment when there is no adjudication entitling the party to costs, the other party to the action must move to strike the costs from the judgment.

An appeal from the decision of the clerk allowing or disallowing costs, cannot be sanctioned.

It would be treating the humblest ministerial action as judicial, converting the clerk into a judge without any color of authority for so doing.

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I have said thus much on the question of appeals from clerks, on the allowance or disallowance of costs to put an end if possible to a practice wholly irregular and unnecessary.

I shall consider the appeal as if the order had been made on a motion to the special term to strike the costs from the record, which it ought to have been.

The adjudication of the justice before whom the cause was first tried, is conclusive upon the question as to the amount of the accounts of both parties.

After that adjudication, the plaintiff was bound to commence his action in the supreme court, and was entitled to costs on the recovery of any amount in that court.

Section 304 of the Code provides, that the plaintiff shall be allowed costs of course in actions of which a court of justice of the peace has no jurisdiction.

The accounts of the parties exceeded \$400 in amount, a justice of the peace had no jurisdiction. (*Code*, § 54).

It is thus demonstrated, that the plaintiff was entitled to costs.

If the judgment of the justice was not conclusive as to the amount of the accounts, the finding of the referee most assuredly was. But if these should still leave the question in doubt, the defendant is both legally and morally estopped from denying it. His counsel, on the trial, before the justice objected to the further prosecution of the action in that court, because the accounts exceeded the amount, of which the justice had jurisdiction. After procuring the dismissal of the action, and compelling a suit to be brought in this court, he cannot now be heard to insist that the justice had jurisdiction. Fair dealing forbids that such conduct should be sanctioned or approved.

The order of the special term is affirmed, with \$10 costs.

COURT OF APPEALS.

In the matter of the application of JOHN A. DUFF, receiver of the Olympic Theatre, for authority to lease the same.

An order of the special term prescribing the terms upon which a lease of certain real and personal property was directed to be executed, *is appealable* to the general term.

The general terms were designed, not only, for the redress of *legal* errors occurring at the special terms, and before referees, but those of *fact* likewise. Hence, a review of the facts may be had before the general term, upon an appeal taken from the judgment, and orders of the former courts.

They were also designed to redress wrongs arising from an erroneous, arbitrary, or otherwise improper exercise of discretion by the former. Hence, the definition of a *substantial right* as used in the 349th section of the Code in providing for appeals from the special to the general term of the supreme court, in the case the *People* agt, *N. Y. Central R. R. Co.*, (29 *N. Y.*, 418).

December, 1870.

APPEAL from an order of the general term in the first district, dismissing an appeal from an order of the special term.

B. C. THAYER, *for appellant*—*Bolles*.

BROWN, HALL, and VANDERPOOL, *for respondent*—*Duff*.

GROVER, J.—The order of the general term from which the appeal was taken, was one dismissing an appeal from an order of the special term, prescribing the terms upon which a lease of certain real and personal property in the city of New York, was directed to be executed by the respondent to Mr. Hayes. The respondent was appointed receiver in an action instituted against him by certain parties claiming the right to redeem the property from him upon the ground that he was mortgagee in possession, but

of which he claimed to be the absolute owner. The appointment of the respondent was made after judgment in the action, declaring that the appellant was entitled to redeem the property from the respondent.

The only ground upon which the appeal was dismissed by the general term was, that the order of the special term was one resting in discretion, and therefore, final in its character, and not appealable to or reviewable by the general term. (*Sec 349 of the Code*,) provides that an appeal may be taken to the general term from an order made at special term by a single judge in the following, among other cases: 3d. When it involves the merits of the action, or some parts thereof, or affects a substantial right. 5th. When the order is made in a summary application in an action after judgment, and affects a substantial right.

It will, thus be seen, that the question as to the appealability of the order is the same, whether it is regarded as having been made in the action or as made upon a summary application after judgment. In either view, to make it appealable to the general term, it must affect a substantial right.

It was supposed by the general term, that the definition given by this court of a substantial right in *Barante* agt. *Deyermant*, (41 N. Y., 355;) and in *Foote* agt. *Lathrop*, (41 N. Y. 359,) and in some other cases, was controlling upon that court, and that its meaning as used in section 349, regulating appeals from the special to the general term, was identical with its meaning as used in section 11, regulating appeals from the general term to this court.

If right in this conclusion, the order appealed from is correct, and must be affirmed, as it cannot be denied, that while it was the absolute right of the parties to have the property in question leased upon the most advantageous terms for those having interests therein, yet, the determination of what would be most advantageous when the character of

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the property is taken into view, involves to some extent, the exercise of discretions.

In *Barante* agt. *Deyermant*, and *Foote* agt. *Lathrop*, (*supra.*) it was held that the term "substantial right" as used in section 11 of the Code, must be one not only involving some material interest, but one existing absolutely by force of law. In other words, that an absolute right was one to which the party was legally entitled *ex debito justitiæ*, one not at all dependent upon the favor or discretion of the court. It will be seen in thus defining it, the court was speaking of it as used in section 11, regulating appeals from the general term to this court, and had in view its use in no other connection. The definition so given, applied as above stated, was correct, and was, in 1870, so recognized by the legislature in amending the Code.

By that amendment, to make an order of this class appealable to this court, it must not only affect a substantial right, but must not involve the exercise of discretion. The latter quality is not requisite to the appealability of orders from the special to the general term of the supreme court. The difference arises from the different purposes for which respective courts were organized. The court of appeals was designed for the redress of such legal errors as might happen in the course of judicature in other courts, to the end that uniformity in the administration of justice might prevail throughout the state, and that every litigant might have his case tried by the same legal rules. For this purpose, no review upon the facts by this court is given, except so far as the same was necessary to determine legal questions arising thereon, such as exceptions to the granting or denying nonsuits, except in one or two instances. The right to review and control the exercise of the discretion of other courts has not been conferred upon this court, unless by the clauses of the 11th section, previous to the amendment of 1870, making orders affecting a substantial right appealable to this court.

In the construction of these clauses, it was assumed by the court, that the legislature did not intend to innovate upon the object, and designs for which the court was constituted, and thereby add to its functions the duty of reviewing the exercise of discretion of the other courts in all cases where the right of parties might be materially affected thereby. Had such been the legislative intention, and the court had undertaken that duty, it is obvious that so much of its time would have been occupied in its discharge as to practically render the court powerless for the discharge of its primary functions. For these reasons it was held, that by the term substantial right, as used in section 11 of the Code, was to be understood such rights only as the law absolutely conferred, and not such as were dependent upon the exercise of discretion or the favor of the court. This construction harmonized the clauses in which it occurred with other parts of the Code, giving an appeal to this court upon questions of law only.

But none of these reasons apply to appeals from the special to the general term. The latter were designed not only for the redress of legal errors occurring at the special terms, circuits, and before referees, but those of fact likewise. Hence, a review of the facts may be had before the general terms, upon an appeal taken from the judgment and orders of the former courts. They were also designed to redress wrongs arising from an erroneous arbitrary or otherwise improper exercise of discretion by the former. Hence, the definition of substantial right as used in the 349th section of the Code, in providing for appeals from the special to the general term of the supreme court in the *People* agt. *N. Y. Central R. R. Co.*, (29 *N. Y.*, 418).

In this case the special term had allowed the modest sum of twenty thousand dollars as an extra allowance to indemnify a party for the expenses of trying what was claimed to be a difficult and extraordinary case, pursuant to the statute authorizing the court to make such allowances in

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such cases. Upon appeal from the order to the general term, the appeal was dismissed upon the ground, that the extra allowance was by the statute placed in the discretion of the court, and therefore, not a substantial right; upon appeal therefrom to this court, it was rightly held that the right to twenty thousand dollars was a very substantial one within the meaning of the section under consideration, and that the people had the right to the exercise of the discretion of the general as well as of the special term, before paying it, and thereupon reversed the order of the general term, and directed that court to proceed and hear the appeal and dispose of the case as in its judgment equity might require. In this case, a just definition of a substantial right as used in that section is given by DENIO, Judge. This case has never been overruled in any respect, and is understood law as to the appealability of orders from the special to the general term.

In the present case, it appeared from the affidavits presented at the special term, that it was at least possible that the property might have been leased upon terms more advantageous than those directed by the special term. It was the duty of the general term to entertain and hear the appeal, and make such order thereupon as it deemed just. It is claimed by the counsel for the appellant, that inasmuch as the general term had once heard the appeal and reversed the order of the special term, that the general term had no power to grant a rehearing of the case. This position cannot be sustained. It was competent for the general term in its discretion, if satisfied that injustice had been done by it, to set aside the order made, and again hear the case, and upon such further hearing, make such order as it determined was just and proper. The order appealed from must be reversed, with costs, and the case remanded to the supreme court, to hear and determine the appeal.

My brethren concur in the result, but claiming it unnecessary to determine what is a substantial right as used in section 11 of the Code, do not pass upon that question.

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COURT OF APPEALS.

JESSE N. BOLLES, receiver, &c., appellant, agt. John A. DUFF, *et al*, respondents.

An action by a general assignee of an insolvent debtor, to have declared, an assignment of a lease of real estate. absolute on its face, made by the debtor to the defendants, a mortgage, as security for money loaned to the debtor and to redeem the premises therefrom, and upon the trial the court decree that the assignment is a security in the nature of a mortgage, and that the plaintiff, on payment of a certain sum of money to the defendants within a certain time the defendants should reassign the lease, but in default of such payment within the time the plaintiff's complaint was to stand dismissed out of court, and the plaintiff, neglects to pay the money and does not in any respect, comply with the terms of the decree:—Such an action and decree is *no bar* to a subsequent action brought by a receiver in supplementary proceedings of the debtor, to reach his interest in the property leased and to get the benefit of the decree in the hands of an assignee, claiming as owner absolute by an assignment of the lease and the decree from the original defendant, with the consent of the plaintiff in the first suit.

The main purpose of the first suit was not merely to *redeem*, but to have the assignment of the lease adjudged to be merely a mortgage; therefore, the failure of the plaintiff in that suit to pay the sum decreed to be due, within the time allowed, and a dismissal of the complaint, did not operate as a strict foreclosure, and a forfeiture of the estate.

Besides, the time allowed to a party to pay the amount accrued to be due on a bill to redeem is usually six months; in this case it was limited to two months, and to pay the large sum of \$26,240 97.

Again, if the claimant of the property as assignee of the original defendants, insists upon this forfeiture he must show that the decree clearly gives it to him; and it seems that there never was, in this case, any *final order* (on proof of the fact that there had been no payment,) that the complaint should stand dismissed. This final order is necessary in a strict foreclosure implied from a dismissal of a bill to redeem; until that order is obtained the records of the court do not show which party has finally obtained the judgment or who is the owner of the land; and until that order is obtained the complainant may apply to have the time to pay the amount decreed to be due, extended.

Argued, December, 1870.

APPEAL from an order of the general term of the first district.

B. C. THAYER, *for appellant*—*Bolles.*

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BROWN, HALL *and* VANDERPOEL, *and* JOHN GRAHAM,
for respondent—Duff.

By the court, PECKHAM, J.—On the 26th of July, 1856, one Trimble assigned to Whitney & Earle, of New York city, as security for a loan to him, a lease of certain lots upon which he afterwards erected what was known as Laura Keene's Theatre, costing about \$50,000. Upon its face the assignment was absolute. On the 7th of January, 1857, Trimble assigned said lease and all his other property to one Roberts, in trust to pay debts, and if any surplus to return it to Trimble.

In the spring of 1857, Roberts having first tendered to Whitney & Earle some \$36,000, in full for the money advanced on the security of the said lease, and demanded an assignment thereof to him and surrender of the premises leased, commenced an action against them to have said assignment of the lease declared a mere security or mortgage for the money advanced thereon, and redeem the premises therefrom. W. & E. denied that the assignment was intended as a security, but insisted it was, and was intended to be absolute, but asked for no foreclosure or other affirmative relief. Such proceedings were had in that suit, that upon the report of a referee as to the amount advanced and unpaid, the supreme court on the 13th December, 1862, adjudged that the sum of \$26,240 97, was due to Whitney & Earle from Trimble, and that said assignment of the lease was taken and held as a security therefor; that upon payment thereof within two months from that date, they should reassign the lease to Roberts, "but in default of the plaintiff paying to the said defendant the aforesaid sum of \$26,240 97, with interest from the 13th of December, 1862, within the time aforesaid, it is ordered that the said plaintiff's complaint be and do from thenceforth stand dismissed out of this court."

On the 22d day of January, 1863, the defendant, Duff pro-

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cured an assignment from Whitney & Earle with the written consent of Roberts, of all their rights under said lease and under said decree. Roberts did not pay the money specified in the decree. In the early part of July, 1863, the plaintiff in this suit, who had been appointed receiver in supplementary proceedings by certain creditors of Trimble, commenced this suit, to get the benefit of the decree made in the suit of Roberts against Whitney & Earle. This suit was commenced in behalf of the plaintiff and all other creditors of Trimble, and it alleges among other things in substance, that Roberts neglected to give the creditors of Trimble notice to aid him in complying with the decree, and wilfully and by collusion with Duff neglected and refused to pay it himself. The answer of Roberts does not deny the collusion or the wilful neglect, and refusal to redeem. The answer of Duff denies all collusion, and claims the property as his own. The cause was tried before Justice POTTER, who found the facts as to the lease, the advance by way of loan by Whitney & Earle upon the assignment thereof to them, the general assignment by Trimble to Roberts for the benefit of creditors. The action by Roberts against Whitney & Earle, the decree therein, and the assignment of that decree to Duff with the assent of Roberts as before stated, and with full knowledge by Duff of all the antecedent facts as to the nature of the assignment of the lease to Whitney & Earle, and its object.

That Roberts never offered the property at public or private sale, and did not notify the creditors of Trimble of the decree or its requirements, that he was insolvent, and though prior to the 22d January, 1863, (the date of the assignment to Duff,) he applied to several parties to take up said decree, yet it did not appear upon what terms, or for whose benefit.

That after that date, Roberts made no attempt to sell the property or to obtain its rents, or in any way to make it available to the creditors of Trimble, but tacitly consented

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that Duff might keep the same as owner, and that Duff purchased said lease, &c., through a Mr. Kimball, as agent, who was also the attorney of Roberts and Trimble in that transaction, and the court decreed that the property in the hands of Duff, was liable for the claims of the creditors of Trimble, after satisfying the proper advances of Duff, and directed a reference to ascertain the amount of such advances. Upon appeal to the general term, this judgment was reversed by a majority of the court in the first district, and a new trial ordered upon the ground that the judgment in the suit of Roberts against Whitney and Earle was an absolute bar to this action. INGRAHAM, P. J., dissented.

Is that judgment a bar? I incline to think, it is not. It is settled in this state, that in an ordinary action for foreclosure and sale of the premises, the usual decree for that purpose is final so far at least as to be appealable to this court without waiting for the order confirming the report of sale. (*Morris agt. Morange*, 38 N. Y., 172).

In England, a strict foreclosure was the usual remedy. The power to give possession to the purchaser on a foreclosure sale was doubted, but finally exercised by the court of chancery. (*See Kenshaw agt. Thompson*, 4 Johns. Ch., 609, and cases cited). By our statute, the court was given power over the whole subject. Though the act was in a good degree declaratory. (2 R. S., 1912). Strict foreclosures are now rarely pursued or allowed in this state, except in cases where a foreclosure has once been had and the premises sold, but some judgment creditor or person similarly situated not having been made a party, has a right to redeem, as to him a strict foreclosure is proper.

In general, a mere strict foreclosure is a severe remedy. It transfers the absolute title without any sale no matter what the value of the premises. The defense in this case claims, that the suit of *Roberts agt. Whitney & Earle*, was simply to redeem, and the failure to pay the sum decreed to be due within the time allowed, and the complaint being

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dismissed, operated as a strict foreclosure, and the estate of the mortgagor was thereby forfeited. (*Perine agt. Dunn*, 4 *Johns. Ch.*, 140, and cases there cited; *Beach agt. Cooke*, 28 *N. Y.*, 535; *Hansard agt. Hardy*, 18 *Vesey*, 460; *Wood agt. Sun*, 19 *Beav.*, 551). But the main purpose of that suit was not merely to redeem. The object was to have the assignment to Whitney & Earle, (which was absolute on its face,) adjudged to be in fact merely a mortgage. After a long litigation as to that point, the assignment was so held. The time allowed to a party to pay the amount accrued to be due on a bill to redeem, is usually six months. (*Perine agt. Dunn*, *supra*; *Smith's Ch. Pr.*, 2d ed. p. 725.)

In the case at bar, but two months were allowed, though the case had been defended upon a false and unconscientious claim, and the amount to be paid was large. The court, in making that decree, did not, probably have their attention directed to its effect, in case the plaintiff should be unable to pay within the specified time, and though it specifies nothing as to its being or operating as a foreclosure, in case the plaintiff fail to pay, yet, it is in that respect in the usual form of decrees in such cases. (*Smith's Ch. Pr.*, 2d ed. p., 725,) but if the defendant, Duff insists upon this forfeiture, he must show that the decree clearly gives it to him. It seems that there never was in this case, any final order obtained (upon proof of the fact that there had been no payment,) that the complaint should stand dismissed. The authorities in England are quite uniform, that this final order is necessary in a strict foreclosure, and that until that final order is obtained, the mortgage is not foreclosed, and no title passes to the mortgagee. (2d *Danl. Pl. & Pr.* 1205; *Sheriff agt. Sparks*, *West Rep.*, 130; *Thompson agt. Grant*, 4 *Inad.*, 232; *Faulkner agt. Bolton*, 7 *Simd.*, 319; 2 *Fisher on Mortg.* p. 1037 § 1881, *Smith's Ch. Pr.*, 725; *Hansard agt. Hardy*, 18 *Ves.*, 460; *Wood agt. Sun*, 19 *Beav.*, 551). No case is cited in this state to the contrary

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of this rule, but Chancellor KENT in *Perine* agt. *Dunn*, (*Supra*, p. 143,) seems to give it sanction. See his commentary there as to the case of *Jones* agt. *Hendrick*.

Without extending this rule beyond the cases to which it is now applied, I think, it sound in its application here—to a strict foreclosure implied from the dismissal of a bill to redeem, until that order be obtained, the records of the court do not show which party has finally obtained the judgment, or who is the owner of the land. Until that order is obtained, the complainant may apply to have the time to pay the amount decreed to be due, extended.

There are several objections as to the decisions of the court upon admitting or rejecting evidence. But this disposition of the case makes them immaterial. The action is properly instituted by this receiver, under the circumstances of this case, and I think, substantial justice is done by the decree. The main complaint of the defendant, Duff is, that he is not permitted to make a speculation at the expense of the creditors of Trimble, and perhaps of Trimble too, if the proceeds of the property should reach him. If Duff is in any degree right in his estimate of the value of the property, the question of Trimble's participation in any part of the proceeds of the property can never be a practical one. But no facts are found to exclude him.

The order appealed from is reversed, and the judgment of the special term affirmed, with costs.

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SUPREME COURT.

LYMAN KNOWLTON, *et al*, agt. CALEB M. PIERCE, *et al*.

Where several plaintiffs unite in bringing an action against the defendant to recover damages which accrued to them severally, and on the trial the defendant succeeds and has a verdict against *four* of the plaintiffs—the remainder of the plaintiffs recovering against the defendant—and the defendant enters judgment for costs against *two* only of the plaintiffs against whom he obtained verdict, the defendant is entitled to costs against the four plaintiffs.

If the two plaintiffs against whom costs are inserted in the record of judgment, desire to compel the defendant to enter judgment against all the plaintiffs against whom the verdict was rendered, they must apply to the court for that relief. They cannot, on motion, set aside the judgment for irregularity on that ground.

*Fourth Judicial Department, General Term, March, 1871.**Before MULLIN, P. J., JOHNSON and TALCOTT, JJ.*

APPEAL from an order of special term.

Mr. WOODBURY, *for plaintiffs*.

By the court, MULLIN, P. J.—The plaintiffs, sixteen in number, supplied milk to a cheese factory in Cattaraugus county, and each received of the proceeds of the cheese in proportion to the quantity of milk furnished.

The defendant, Pierce was appointed agent to sell the cheese subject to the approval of the defendants, Allen and Rice.

The plaintiffs brought this action against Pierce, to recover damages for the negligence of said Pierce, in selling said cheese, whereby the plaintiffs lost \$1,000.

The defense was a general denial, and a defect of parties plaintiff and defendant.

On the trial, the defendant proved that two of the plain-

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tiffs, Rice and Strickland, had released him from liability to them for the damages sought to be recovered in said action, and that the plaintiffs, Knowlton and Jolles had assented to the sale by the defendant.

The answer did not set up either of said matters in defense, but the court permitted an amendment so as to allow proof thereof to be given.

The court instructed the jury, that such of the plaintiffs as had assented to the sale by defendant, could not recover, and the jury found a verdict in favor of all the plaintiffs, except the four above named, and in favor of the defendant against said four plaintiffs.

The defendant presented to the clerk of Cattaraugus county, a bill of costs in favor of defendant against said four plaintiffs, and the same adjusted by him, and the amount thereof inserted in the judgment against Knowlton and Jolles, only.

A motion was made at the Erie special term in December last, to set aside the adjustment of costs against said Knowlton and Jolles, and to set aside the judgment for costs against them, on the ground that defendant was not entitled to recover costs against a part only of the plaintiffs, and because of the irregularity in entering judgment against two of the plaintiffs only when the verdict was against four.

The motion so made was denied, without costs, and from that order the plaintiffs, Knowlton and Jolles appeal.

Under the former practice, the plaintiffs were nonsuited if part of them only established a cause of action.

The Code has altered the practice in this respect, and provides (§ 274,) that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants.

It follows, that the verdict and the judgment if one has been entered in favor of the defendant, against part of the plaintiffs, was regular.

In the absence of any statutory provision forbidding a

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recovery of costs against the plaintiffs who fail to establish a right of recovery, it is right and just that the defendant should have costs against those of the plaintiffs whom he defeats.

In this case, the defendant was put to the expense and trouble of procuring witnesses to resist a recovery by the four plaintiffs who had either assented to the sale claimed to be unauthorized and improper, and who had actually released him from liability for the wrong done, if any.

If this is not the law, it must necessarily follow, that a plaintiff who has a cause of action in his own individual right, and against which the defendant has no defense, may unite with him any number of persons as plaintiffs and thus compel the defendant to defend the action against persons who have no ground of recovery against him, and yet, he would be deprived of his costs, because one of the number established on the trial a cause of action against him.

This case furnishes a very striking illustration of the propriety of allowing the defendant costs.

While the plaintiffs were obliged to join in bringing the action, the damages accrued to them severally, and if any of them had been paid or had released the cause of action, this recovery must be limited to the amount of damages sustained by those who had not been paid, or who had not released. As to each of the last mentioned persons, the action was in its nature several, and a defense against the plaintiffs severally, was admissable.

The entry of costs in the record in favor of defendant, was right, and the order in that respect, must be affirmed.

The plaintiffs, Knowlton & Jolles do not ask to compel the defendant to correct the record of judgment by making it a judgment against the four plaintiffs, against whom the verdict was rendered, but he asks to set aside the judgment for costs in favor of the defendant, because of the irregularity in the entry of the judgment. In other words, they insist they are to be relieved from costs, because of the irregu

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larity. Such is not the result of the error if it is one. And whether it is or is not, is not before us. If the plaintiffs desire to compel the defendant to enter judgment against all of the plaintiffs against whom the verdict was rendered, they must apply to the court for that relief.

The order appealed from, must be affirmed, with \$10 costs, but with leave to plaintiffs to move to compel the defendant to enter judgment in accordance with the verdict of the jury.

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SUPREME COURT.

47 Hun 496-497

JAMES FISK, Jr. agt. THE ALBANY & SUSQUEHANNA RAIL-ROAD Co. and others.

Where an order is made, *changing the place of trial* in a cause to another county, the change is effected *at once*. The transfer of the papers is a subsequent clerical duty.

This change is not affected by a subsequent chamber order to show cause why the order making the change should not be corrected, with a stay of proceedings mean time, and with an order forbidding the county clerk to transfer the papers in the cause.

Nor is the order making such change, affected by a subsequent *appeal* therefrom to the general term.

It is very doubtful whether an order changing the place of trial for the convenience of witnesses is *appealable*.

Where the place of trial is located in the city and county of New York, and on motion it is changed to another county, no motion can be heard in the cause in the first district.

Where the judge has settled an order in his own language, on a hearing of both parties, no other court is competent to correct the order which he has thus settled.

Albany, Special Term, December, 1870.

THE place of trial in this action was originally in New York. A motion was made on behalf of all the defendants, except Herrick, to change the place of trial to Albany county, on account of the convenience of witnesses. This motion was heard at special term in New York, before Mr. Justice BRADY, and was decided by him on the 15th of December. His decision was, that the place of trial should be changed to Albany county, unless the plaintiff's counsel should prefer Rensselaer, in which case it should be changed to Rensselaer.

The plaintiff's counsel, thereupon drew up an order changing the place of trial to Rensselaer county, and the same was entered on the 15th December.

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On the 20th of December, upon the suggestion of defendant's counsel, that the order ought to express that the change to Rensselaer county, was in consequence of the preference of plaintiff's counsel for Rensselaer, over Albany, and on notice to the plaintiff's counsel, Mr. Justice BRADY, after hearing counsel for both parties, settled the form of the order, and the same was accordingly entered as of the 15th of December.

The order as thus entered states, that the court had announced its decision, that the place of trial be changed to Albany, unless the plaintiff's counsel should elect that it be changed to Rensselaer, and that the plaintiff's counsel having so elected, it is ordered that the place of trial be changed to Rensselaer.

Thereupon, upon an affidavit of Mr. Schamp, stating that he was present at this settlement; that the plaintiff's counsel declined to elect to take any other county than New York; that he consented to no statement on that subject in the order, except a bare expression of preference for Rensselaer, over Albany county; the plaintiff procured from Mr. Justice BARNARD, on the same 20th day of December, a chamber order to show cause at special term in New York, December 27th, why the aforesaid order should not be corrected to conform to the facts stated in that affidavit, with a stay of proceedings mean time, and an order to the county clerk not to remove the papers to any county.

A certified copy of the order granted on the 20th, by Mr. Justice BRADY, was filed in Rensselaer county, December 21st.

On the 20th of December, the plaintiffs appealed from the order changing the place of trial; that is, the order as settled that day by Mr. Justice BRADY, and obtained from the special term at New York, held by Mr. Justice BARNARD, an order *ex parte*, staying proceedings until the determination of the appeal, and forbidding the county clerk to transfer the papers until the decision of the appeal.

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Two separate motions are now made by the defendants.

First. A motion to vacate and set aside the last mentioned order, staying proceedings during the appeal.

Second. To vacate the aforesaid chamber order of Mr. Justice BARNARD, and to stay plaintiffs from proceedings in the first judicial district.

Mr. HALE, *for defendants on first motion.*

Mr. PECKHAM, *on second.*

Mr. SHEARMAN, *for plaintiff.*

LEARNED, J.—The order of special term granted on the 15th of December, changed the place of trial to Rensselaer at once. The transfer of the papers is a subsequent clerical duty. But the place of trial is none the less changed, although the clerk should neglect his duty. It is often the case, that no papers are on file. But that fact would not prevent the place of trial, or the cause from being changed from one county to another.

Under the former practice, the court could change the issue. And yet, the papers in the cause remained in that one of the four clerk's offices in which they had been filed. There can be no doubt, therefore, that from the granting of the order, the place of trial has been and is Rensselaer county. This change is not affected by the stay of proceedings, or by the appeal. If the general term should hold the order to be appealable, and should reverse it, then the place of trial would be changed back to New York. But in the meantime, it is in Rensselaer; and there is where the papers should be. The county clerk, therefore, should not be forbidden to transfer them where they belong.

If the stay of proceedings prevented the clerk from transferring the papers, then it was unnecessary to insert that additional clause forbidding the transfer. If it did not, then the clause should not have been inserted. For a stay of

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proceedings is all that is authorized on such an appeal. (*Sec. 350*).

I see no reason why there should be a stay of proceedings. It is very doubtful whether the order is appealable. The change of trial is for the convenience of witnesses, and I do not think, that an order which is granted for their convenience can be said to affect a "substantial right."

It is a matter of *convenience*; and that too, not the convenience of the parties, but of witnesses. So far as I know, such an order has never been held to be appealable. *Houck agt. Lasher*, (17 *How.*, 520,) was a case where the county designated was claimed not to be the proper county under section 125, and presented a different question. There is a plain omission of the word "not" on page 523 of Judge HARRIS's opinion, so that his remark, (which may be *obiter*,) is to the effect that a change of the place of trial on the ground of the convenience of witnesses is not appealable.

The defendant ought to be at liberty to go on with the action; to notice the appeal for argument; to notice the case for trial, and to try it.

As to the chamber order granted December 20, returnable the 27th, I think it irregular. No motion can be heard in the first district, since the place of trial has been changed to Rensselaer. (*Sec. 401, sub. 4*).

If that order is put on the ground that, it is only for the purpose of a resettling of the order granted by the special term held by Judge BRADY, then it is more than irregular. The settling of an order is merely the putting a judge's decision into formal language. When a judge has thus expressed in formal language what is the decision of the court held by him; no court has any right to alter it. An appellate court may reverse it. But it is preposterous to claim that the judge does not know how to express his own decision, and that some other court must correct his statement of what he decided. The evils of such a practice as is here attempted, are too plain to need comment. And in this case,

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there is nothing to correct. The defendants made out such a case as satisfied the court, that the place of trial should be changed for the convenience of witnesses. The court gave the plaintiffs the privilege of having it changed to Rensselaer, rather than Albany, if he so elected. His counsel drew an order changing it to Rensselaer; which was a plain, common sense expression of such election. On a subsequent day, according to the affidavits used by him, his counsel expressed a *bare preference*, or in other words, "he was willing to signify his preference to Rensselaer, over Albany.

And it appears to me, that with great propriety, Judge BRADY, thereupon stated, that the plaintiff's counsel had elected that the change should be to Rensselaer.

It is difficult to see what else he could have stated. And, at any rate, no other court is competent so correct the order which he has thus settled, and settled on a hearing of both parties.

A part of the relief asked for on the second motion is a stay of any proceedings by the plaintiff in the first judicial district. I do not think, this would be proper. If I am correct in my views, that the place of trial is changed to Rensselaer, then I must assume that the courts of that district will not act where they have no jurisdiction. If they differ from me, and hold that the place of trial is still in New York, and that they have jurisdiction; the decision on the two conflicting views will have to be made by a higher tribunal.

An order must be entered, setting aside and vacating the order made by special term, before Mr. Justice BARNARD, December 20, staying proceedings, with \$10 costs motion; and also an order must be entered setting aside the chamber's order made by Mr. Justice BARNARD the same day, requiring the defendants to show cause, &c., and the stay, meantime, with \$10 costs motion.

And these orders will be entered in Rensselaer.

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N. Y. COMMON PLEAS.

GURDON BUCK agt. FRANCIS H. AMIDON.

It is a general principle pervading the law of *agency* that one who procures services to be done for another, is not himself chargeable as the debtor, unless he omits to make known his principal, or erroneously supposes that he has authority, or exceeds his authority, or expressly or impliedly engages to be answerable, either by directly promising to pay for them, if rendered, or by doing or saying something which justifies the person who is to perform them, in supposing that the one who applies to him engages to pay for them.*

This principle applied in the present case, where the defendant took a telegram to the plaintiff—a surgeon in the city of New York, from the family physician of the defendant's brother in Connecticut, who had, in pursuance of such telegram, a surgical operation performed by the plaintiff, and the defendant, also a resident of the city of New York, went with the plaintiff to Connecticut, and paid the plaintiff's railroad fares, but as appeared from the evidence, said nor did nothing beyond the duties of an agent that would make him liable for the services performed by the plaintiff for his brother.

General Term, June, 1870.

THERE is no conflict in respect to the facts in this case. There may be some little variation or difference between Dr. Buck and the defendant's account of what occurred between them, but nothing that could materially affect the case. It is only that difference ordinarily found between two persons in narrating the same transaction, but not any difference as to the facts, which as narrated by both are substantially the same.

The defendant's brother J. C. Amidon, who was a resident of Groton in Connecticut, had an affection of the bladder for which he was attended by a Dr. Francis, of New London, and while the doctor was engaged in drawing the patient's water by means of a cathetar, the cap or button of the instrument broke off and the cathetar passed into the bladder a very unusual circumstance, and which involved the

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necessity of a very delicate and skillful operation to extract the cathetar. The family was alarmed at the accident and requested the doctor to send to New York for a surgeon, by telegraph, and "to make the thing sure" to send the dispatch to the patient's brother, F. H. Amidon, the defendant, as "he would be sure to deliver it." Dr. Francis accordingly sent a dispatch to the defendant, in these words: "New London, Nov. 20, 1869, 2 p.m., to Francis Amidon, 649 Broadway, N. Y. Don't fail to come and bring a surgeon to-night. GURDON BUCK, M.D., 121 Tenth street. Please come immediately, elastic cathetar lost in the bladder of patient, possibly also stone. If you cannot come please direct to the most suitable surgeon. Dr. FRANCIS. Please answer, but don't fail to come with a surgeon." It was a dispatch alike to the defendant and Dr. Buck, or as Dr. Francis testified, he sent two dispatches, which were probably united in one.

Immediately upon receiving the dispatch, the defendant went to the residence of Dr. Buck, the plaintiff, who is an eminent surgeon in this city, and told him that he had received a telegram from his brother's physician requesting him to bring up a surgeon that might relieve his brother, living opposite New London (Groton), who had got a cathetar in his bladder, and taking out the dispatch he read it to the plaintiff. He asked the plaintiff if he knew Dr. Francis, his brother's physician, and the other said, "no, but that he may have met him." Upon which the defendant replied, that he must have heard of some operation of his, from his directing the defendant to call upon him, to which the plaintiff answered, that he was somewhat unknown as a surgeon. The defendant then said, "the question is, can you go," and the plaintiff after some hesitation said "yes." The defendant then advised him, that there was a train that evening at 8 p.m., that if he could go the defendant would go with him, and it was arranged that they should meet at the depot. The defendant then went away, and

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apprehending there might be some misunderstanding, returned and left the telegram with the plaintiff in order as he said, that he might understand Dr. Francis' better than he did, and they exchanged a few words concerning the appointment for the evening train at 8 o'clock. Nothing was said about who was to pay the plaintiff. The defendant testified that he did not consider that he had any discretion in the matter, and the plaintiff testified that when the dispatch was left with him he took it to the light in his office and seeing it was addressed to F. H. Amidon, he referred to directory and finding he said, that the person who called upon him was Mr. Amidon, the latter, he took it for granted that he was dealing with a responsible party.

The plaintiff and the defendant met, pursuant to the appointment, in the evening, at the depot, and went up together to Groton, defendant paying Dr. Buck's fare, upon the doctor's arrival at three o'clock in the morning he examined the patient and during that day the operation, which is elaborately detailed in the evidence, was successfully and very skillfully performed by him, to the great relief of the patient, and to the satisfaction of the attending physician and of all parties.

The plaintiff testified that he noticed, that the patient was living upon a moderate scale, and that he was taken by surprise to be sent for so far by a man living apparently upon a moderate scale ; that he considered that people in straitened circumstances do not send to distant cities for eminent medical service unless they are able to pay for it, or unless they have friends who can, and that he took into consideration that New England people should not be taken by their appearance, and knew that the patient, had kind friends who could be responsible for extra medical services.

Upon the evening of the day of the operation and shortly before the departure of the plaintiff the defendant's brother sent for him and requested him to ask the doctor for his bill, which the defendant accordingly did.

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The plaintiff replied that it did not matter about presenting a bill then, and gave the defendant a piece of paper with these words written upon it, "Dr. Buck, 46 West 29th Street, \$400. The defendant then went into his brother's room, told him what the doctor's bill was and he expressed great surprise. The defendant returned and told the doctor that his brother thought it was a very large bill, and that he must remember that his brother was not a rich man, and the doctor answered that he supposed that people who could send for a surgeon that distance were rich, or as the plaintiff testified, he replied, that he had taken that into consideration; that he was not accustomed to go away and render service except upon such terms; that he had rendered a very important service and saved the patient from a very serious operation which would have been necessary, if the plaintiff had not succeeded, as he did; which was the first occasion upon which anything had passed between the defendant and the doctor upon the subject of his remuneration.

The doctor then left, and eight days afterward he sent a bill to the defendant in which the patient was named as the debtor. It was in these words, "New York, Nov. 29, 1869, Mr. J. C. Amidon, Groton, Conn. to Dr. Gurdon Buck, Dr. No. 46 West 29th Street. To professional services, surgical operations at Groton, Conn., &c. &c., \$400," which the plaintiff says he sent to the defendant as he supposed that the brother in New York, was the proper channel to send the bill to, and on the 4th of December following, the plaintiff sent to the patient the following letter: "Mr. J. C. Amidon, Groton, Conn. Dear sir, after waiting a reasonable time without hearing *from you*, I beg leave to remind you that it is customary to settle such accounts as mine, for professional services rendered at a distance, promptly. Hoping it will receive your early attention, I remain," &c.

This letter was followed by letters between the plaintiff and Dr. Francis of New London, and by a letter from the

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patient, and a note from the defendant as indicated in the following letter which the plaintiff addressed to the patient on the 14th of December, 1869.

“Mr. J. C. Amidon. Dear sir, I beg to acknowledge your favor of the 9th instant, and to inform you that your brother addressed me a note yesterday offering me one hundred and fifty dollars in settlement of my bill for professional services. I wrote Dr. Francis in reply to a letter received from him last week, and in consideration of explanation made by him, I expressed my willingness to make a concession of \$100, in settlement of my bill; I desired him to communicate the contents of my letter to you, and supposing him to have done so, I received your last proposal with no little surprise. I am not disposed to conform my terms to *your* idea of liberal remuneration, and have not been accustomed after rendering important services, especially at a distance, to submit to conditions the design of which seems to be to determine how little may be got off with. I shall still adhere to my terms of \$300, and hope there may be no further delay in settling. Very respectfully,” &c.

The plaintiff testified that \$500 would have been his charge, but for the circumstances in which he found the defendant's brother living; and two eminent surgeons, Doctors Parker and Van Buren testified that \$500 would have been a reasonable charge. Upon this state of facts, the judge left it to the jury to determine who employed the plaintiff, or upon whose account and credit the services were rendered, and the jury found a verdict for the plaintiff for \$400. The defendant appealed.

IRA D. WARREN, *for appellant.*

I. The question as to whether the credit was given to the patient or to his brother, the defendant, was a question of law. There is not the slightest conflict of evidence on that

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subject. Both the plaintiff and defendant agree exactly as to what occurred when the defendant called on him, and therefore it becomes a question of law. (*Pratt agt. Foot*, 9 N Y., 465).

II. When a man calls on a physician at the request of a sick friend, and requests the physician to pay his friend a visit, stating who the services are for, showing the physician a letter requesting him to call, and the full particulars of it, and the physician does call and renders the service at the patient's house, sends the patient a bill for the service, writes the patient letter after letter requesting payment, makes the charges light, as he testifies, because the patient lives on a moderate scale, it cannot be true, as a question of law, that the physician can afterwards sue for his bill the friend who did the errand.

The statement of the proposition of itself is argument enough to refute it; yet we will refer the Court to a few of the cases which settled this question before any of the parties to this suit were born.

1st. "It is a general rule, standing on strong foundations and pervading every system of jurisprudence, that when an agent is duly constituted, and names his principal, and does not exceed his authority, the principal is responsible, and not the agent. The agent becomes personally liable only when the principal is not known, or when there is no responsible principal, or when the agent becomes liable by an undertaking in his own name, or when he exceeds his powers." (2 *Kent's Comm.*, 630; 1 *American Leading Cases*, 614; *Smith's Mercantile Law*, 144, sec. 7.)

In the case of *Owen agt. Gooch*, (2 *Esp.*, 567), "Gooch gave the order for the work, and told the plaintiff it was for Tipple, and the work was done by the plaintiff at Tipple's house." Lord KENYON, "the mere act of ordering goods for another, does not make the person giving the order liable. Whenever an order is given by one person for another, and he informs the tradesman who that person is, for

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whose use the goods are ordered, he thereby declares himself to be merely an agent, and there is no foundation for holding him liable." This is the settled doctrine of all the cases from that time to this. (*Dunlap's Paly on Agency*, 369, 370, cases cited in note, d; *Story on Agency*, § 261, § 289, note; *Costigan agt. Vanland*, 12 Barb., 458; *Stanton agt. Camp*, 4 Barb., 278; *Dana agt. Monroe*, 38 Barb., 528; *Colvin agt. Holbrook*, 2 Comst., 120,

In this case the plaintiff was shown the telegram, and was informed of all the circumstances. The defendant gave the order for his brother, J. C. Amidon. The services were rendered to J. C. Amidon at his house. The bill was made out to J. C. Amidon. It was made \$400 only, on account of his moderate style of living. The letters show that the credit was given to J. C. Amidon. Mr. J. C. Amidon is perfectly able to pay the bill.

There is not a word of conflict in the evidence on this question.

We therefore say, that the learned justice erred in submitting this case to the jury.

It was in reality submitting the question of law to the jury, and their decision of it is about as intelligent as could be expected.

Juries are to decide conflicting questions of fact, and not questions of law; and there was no conflict of evidence, except as to the *value* of the service.

Should this judgment be sustained, and the doctrine established that a man who, to oblige his friend, calls and requests a doctor to go and see him, must pay that doctor's bill; particularly where he discloses all the facts, as in this case, we may soon expect to see the streets infested by men afflicted with all the diseases to which human flesh is heir, in pursuit of their own doctors.

Perhaps, for the benefit of some of the patients, such a rule might be of more benefit than the doctors' nauseous

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doses; but, for the patient's friend, such a rule would be the most nauseous dose of all.

We are confident, however, that no such rule can be sustained on principle or authority.

III. We ask that this judgment be reversed.

CHAS. W. BETTS *for respondent*.

By the Court, DALY, C. J.—It is suggested in answer to the appeal, that the question to whom the credit was given, was one of the intentions of the parties, as deduced from the facts and circumstances, and that the jury having drawn the deduction that the services were rendered upon the credit of the defendant, their verdict should not be disturbed. Where, upon an uncontroverted state of facts, the point involved remains doubtful, or upon undisputed facts inferences may be drawn either way, the question is properly one for the jury, and their finding should be conclusive; in all such cases, the unanimous concurrence of the twelve minds in the jury box is as satisfactory a mode of reaching a right conclusion, as to attempt to work it out by legal deductions or logical reasoning. But in all such cases there must be something in the evidence to found the conclusion upon, and in this case I fail to discover anything showing or tending to show, that the defendant ever did or said anything to warrant the plaintiff in assuming before he went to Groton, and before he performed the operation, that the defendant was to pay him for his services. It would be preposterous to say that a person who brings a message to a surgeon from the attending physician of a patient, requesting him to come and perform an operation upon the patient, is, by the mere delivery of such a message, chargeable with the obligation of paying the surgeon for his services. He is a mere agent and nothing more, unless he communicates the message in such a way, or does, or says something that

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fairly warrants the surgeon, before he undertakes the service, in supposing that he is the person who is to pay for it, and in this respect it can make no difference that the bearer of the message happens to be a brother of the patient.

It is a general principle pervading the law of agency, that one who procures services to be done for another is not himself chargeable as the debtor, unless he omits to make known his principal or erroneously supposes that he has authority, or exceeds his authority, or expressly, or implicitly engages to be answerable either by direct promising to pay for them if rendered; or by doing or saying something which justifies the person who is to perform them, in supposing that the one who applies to him engages to pay for them. The law is too well settled in this respect to make it necessary to refer to authorities, and the direct application of it to the facts now before us may be illustrated by the case to which the appellant has called our attention. (*Owen agt. Gooch*, 2 *Esp.*, 567.)

The plaintiff was a paper hanger, and the defendant gave him an order for paper, and work to be done in the way of his business in the house of one Toppel, the plaintiff being informed, when the order was given, that the work was on Toppel's account, and the entry upon the plaintiff's book being "Mr. Toppel, by order of Gooch." It was argued in that case, as it is in this, that the person for whom the work was done may have been unknown to the plaintiff, but the defendant Gooch was known to him, and that under such circumstances, the work must be deemed to have been ordered on his credit, and that he was consequently liable.

The answer of Lord KENYON may be quoted as pertinent in its general bearing to the present case. He said, "if the mere act of ordering goods was to make the party who ordered them liable, no man could give an order for a friend in the country, who might request him to do it, without risk to himself. If a party orders goods from a tradesman, though in fact they are for another, if the tradesman is

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not informed at the time that they were for the use of another, he who ordered them is certainly liable, for the tradesman must be presumed to have looked to his credit only.* * But whenever an order is given by one person for another, and he informs the tradesman who the person is, for whose use the goods are ordered, he thereby declares himself to be merely an agent, and there is no foundation for holding him to be liable."

In the present case, the defendant exhibited and left with the plaintiff, the dispatch he had received, and the plaintiff admitted upon the trial that the defendant told him that the patient therein referred to was his brother. He was therefore informed beforehand of the person on whom the operation was to be performed, and the argument of the plaintiff's counsel upon this appeal, that the plaintiff knew nothing about the defendant's brother, not even his name, made no inquiries about him or his responsibility, and hence could not have contracted for his services upon his credit, is sufficiently answered by the remark above quoted, from Lord KENYON.

This is all the defendant did, except to pay the plaintiff's fare to New London ; but this was after the doctor had come to the railroad, prepared to go to Groton and perform the operation, and was in itself too slight a circumstance upon which to found an implied engagement to pay the plaintiff for his services.

But the case is not only destitute of any act upon the part of the defendant which would justify the plaintiff in assuming, when he consented to go, that the defendant was to pay him, but his own acts then and subsequently show that it was the patient, and not defend, ant that he looked to for the payment of his bill. Before leaving he consulted the directory and found that the person who called upon him was Mr. Amidon, the latter, when he, he says, took it for granted that he was dealing with a responsible party ; but that the one whom he took it for granted was

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a responsible party was the patient upon whom he was to perform the operation, is shown by his own statement upon the trial, that when he reached Groton, he "was taken rather by surprise, to have been sent for so far by a man living upon a moderate scale," but "took it into consideration that New England people should not be taken by their appearance," a presumption in the application of which he may still be right, for there is nothing in the case to show that the defendant's brother was not a responsible person, and able to pay the amount which the plaintiff claimed. All that the case shows is, that he complained that it was too large, and that he offered through his brother to pay a smaller sum.

All the plaintiff's subsequent acts like the preceding, show that it was the person upon whom the operation was performed that he looked to for the payment of his bill. He made it out to him, and sent it to the brother here in New York, because, to use his own words, he supposed that was "the proper *channel* to send it to." That he considered the defendant simply as a channel through which to send the bill to the debtor, is shown by the fact, that after eight days had elapsed without its being paid, he sent a letter, not to the defendant, but to the patient, and advised him that he waited a reasonable time without hearing *from him*, and in the next letter of December, 14, he writes to the patient, "I received *your* last proposal (the \$150,) with no little surprise, I am not disposed to conform my terms to *your* ideas," and he ends by hoping that there may be no further delay in settling. All this conclusively shows to whom the credit was given and by whom, from the beginning, he supposed he was to be paid.

In the question, which arises so frequently under the statute of frauds, to whom was the credit given in case when the point is, whether the promise was collateral to answer in default of another, on an original undertaking, great weight is attached to the fact that the plaintiff has

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charged the debt upon his books, or made out the bill, to the person who received the goods, to show the promise of the defendant was simply collateral, and therefore, void for not being in writing. (*Anderson agt. Hayman*, 1 *H. B. L.*, 121; *Dixon agt. Frazee*, 1 *E. D. Smith*, 34; *Sarson agt. Wyman*, 14 *Wood*, 246; *Broome on Statute of Frauds*, § 198).

It is not absolutely conclusive, as it may be shown, that it was done by mistake. (*Loomis agt. Smith*, 17 *Conn.*, 115); but it is a most material, and without explanation, a controlling circumstance; for as my former colleague, Judge WOODRUFF remarked in *Dixon agt. Frazee*, suppose the plaintiff thereby puts his own construction upon the agreement. Such was the case here. The plaintiff made out his bill against the defendant's brother, and nothing appearing to show that this was done by mistake, or any explanation given why he did so. The same construction would be given to so material a circumstance as was given in the cases above quoted, so that if even the defendant had promised the plaintiff, the understanding would be collateral and void under the statute, not being in writing.

After going carefully over the evidence, I can find nothing in it to support the verdict, and in my judgment it, should be set aside.

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N. Y. SUPERIOR COURT.

MICHAEL SCHAUGHNESSY agt. BERNARD REILLY and others,
and JOHN T. STEWART.

Where a motion to dissolve an injunction was made and granted at a regular special term, and without any appeal from that order, and within a day or two afterwards, *the same attorneys*, upon the same complaint, which had not been newly verified, and with no new or additional affidavit, and without a new undertaking procured from the same judge who had granted the first injunction, upon an *ex parte* application to him, made out of court, and while he was not holding court, and while another judge was holding the regular special term and chambers, another or second injunction of the same tenor and effect of the injunction which had been dissolved, together with an order to show cause thereafter why such last injunction should not be made perpetual :

Held, on a motion to dissolve this second injunction, that the motion be granted with costs to be paid by the plaintiff's attorneys personally ; which was the only punishment or reproof which the court could administer to them ; as it was doubtful if their misconduct was such as would authorize the punishment prescribed by the statute concerning contempt.

Special Term, April, 1870.

MOTION to dissolve an injunction.

In this case it appeared that, on the fourth day of the present month, a judge of this court, upon an *ex parte* application made to him by Morgan & Hanrahan, the plaintiff's attorneys, granted an injunction restraining the defendants from interfering with certain personal property claimed by the plaintiff.

The injunction was granted upon the verified complaint of the plaintiff, which alleged that he was the owner of the property, and that it had been levied upon by the defendant Stewart, one of the marshals of this city, under an execution in favor of the other defendants against one John E. Dowling. That such levy was unlawful, and if the defendants were not restrained, it would produce irreparable injury to the plaintiff.

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Upon a motion before the judge holding the regular special term of the court, made on the 21st day of the present month, after hearing counsel for each of the parties, the court dissolved the injunction with costs, and an order to that effect was duly entered and served upon the plaintiff's attorneys. No appeal was taken from such order, nor was any leave given to renew the motion for another injunction.

Within a day or two afterwards, *the same attorneys*, upon the same complaint, which had not been newly verified, and with no new or additional affidavit, and without a new undertaking procured from the same judge who had granted the first injunction, upon an *ex parte* application to him, made out of the court, and while he was not holding court, and while another judge was holding the regular special term and chambers, another or second injunction of the same tenor and effect of the injunction which had been dissolved, together with an order to show cause, returnable on the seventh day of May, thereafter, why such last injunction should not be made perpetual.

Upon these facts, the judge holding the regular special term, made an order returnable in one day afterwards, why such second injunction should not also be dissolved.

On the return of the order, the defendants appeared. The plaintiff did not appear. The court dissolved the injunction, with costs, which were ordered to be paid by the plaintiff's attorneys *personally*.

JAMES H. COLEMAN, *for the motion*.

MONELL, J.—The only punishment or reproof which this court can administer to the plaintiff's attorneys upon this motion is, to impose upon them personally the payment of the costs of the motion. It is doubtful if their misconduct is such as would authorize the punishment prescribed by the statute concerning contempts (2 R. S. 534), especially,

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as such misconduct was not committed in the presence of the court, and the proof at present before me is not, perhaps, sufficient, and the motion is to dissolve the injunction, and not to attach for a contempt. Enough, however, is before me to show what has been done, and it seems to me that the course which has been pursued by the plaintiff's attorneys in this case, deserves some further reproof than this court has the power to administer upon this application.

The course of practice pursued by such attorneys was unusual, unauthorized, and irregular in every particular. It disturbed and impeded the just and orderly practice in the action. It was a palpable violation of a standing rule of court (*Rule 23*), and a contempt for the order which had been previously made.

The decision dissolving the first injunction was *res judicata*, and no subsequent application, upon the same papers, could be made for another injunction; and the only remedy of the plaintiff was to appeal from such decision, or to ask for leave to renew his motion.

Instead of seeking one or the other of these remedies, the attorneys procured a fresh injunction, in a manner, to my mind, most improper and reprehensible; and their act was not only injurious to the parties to the action, but was degrading to the learned profession of which they are members.

But *this court* has not the power to reach offenders of this kind in the effectual manner that is possessed by another tribunal, and I can, therefore, do no more, as the matter now stands, than to express, as I do most emphatically, my condemnation of conduct which is, as I believe, wholly without justification or excuse, and leave on record the facts, as they have been disclosed before me, to be employed, if it shall be proper, in aid of any desire there may be to relieve the legal profession of the odium which truly or untruly, it is so largely charged, rests upon it.

Rue agt. Perry.

SUPREME COURT.

STEPHEN D. RUE respondent, agt. SAMUEL M. PERRY,
appellant.

A *short summons* can only be issued, by a justice of the peace, against a defendant, who comes within that class of persons, who, by the non-imprisonment act of 1831, cannot be proceeded against by long summons or warrant. And a plaintiff to bring himself within that provision, it must be made to appear to the justice by *affidavit*.

This short summons, therefore, is an extraordinary process, and can only issue on proper preliminary proof; and as no jurisdiction is obtained without such proof, a judgment in this inferior court is to be presumed void, until the party upon whom the *onus* is thrown supplies that proof. The mere memorandum "aff. short summons" upon the justice's docket alone, does not furnish the evidence that the justice had jurisdiction. And where there is no appearance on the part of the defendant there is no waiver of the objection.

But on appeal such a judgment ought not to be reversed, where it appears that it was offered in evidence, on the trial, and the defendant's counsel not only permitted the docket to be read in evidence without objection, but admitted it to be evidence, and the validity of the judgment was not raised on the trial, nor the justice's attention directed to any want of validity in it, and it was not made a matter of contest.

The party is to be presumed, after judgment, to have waived any objection that he might have taken on the trial, but omitted to take.

Third Judicial Department, General Term, April, 1871.
Present, MILLER P. J., POTTER and PARKER, JJ.

THIS was an action commenced in a justice's court, by the plaintiff to recover, by his title as constable, claiming it by virtue of a levy by execution issued by a justice of the peace, certain property which the defendant had purchased of one George W. Bishop, who was the defendant in the said executions. The property was purchased after the levy, but purchased from the defendant who was in the possession, and without knowledge of the levy thereon by the plaintiff.

J. D. WENDEL, *for plaintiff.*

A. H. AYRES, *for defendant.*

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By the court, POTTER, J.—The plaintiff recovered the value of the property before the justice; and the county court of Montgomery county affirmed the judgment; but this court are not informed, upon what ground it was affirmed, by any opinion given by the county judge. And we are, therefore, to look at the proceedings before the justice, to see what errors, if any, were committed by him.

Four grounds of error are set forth in the notice of appeal, but only one of these demands consideration, to wit: *Fourth*. The judgment was unsupported by evidence, in that the plaintiff did not show himself rightfully, nor even colorably, a constable; and in that the evidence of the larger judgment through which the plaintiff claimed to make title, and which was held to be valid, did not show jurisdiction of the person of the defendant therein.

The plaintiff's declaration based his title to the property in question, upon his special interest in the property as a constable, by virtue of a levy by execution issued upon two justice's judgments setting forth the judgments, and the executions issued thereon, and proving his levy. This was a sufficient interest to maintain an action. The executions upon which the plaintiff levied, were good on their face, and would have justified the plaintiff in his action, had he been defendant and sued in trespass for taking it, even though the justice who issued them, had no jurisdiction of the action in which they were rendered. This is intended to be a rule of protection, but that is not the position of the plaintiff in this action. He is plaintiff, and attempts to build up a title upon judgments, by maintaining an action upon them, against a third person.

Here the officer becomes the assaulting party, as was said by BRONSON, J., in *Horton* agt. *Hendershot*, (1 *Hill*, 119). "This rule is intended for a shield, but not a sword." (*Dunlap* agt. *Hunting*, 2 *Denio*, 645; *Earl* agt. *Campt*, 16 *Wend.*, 562).

The plaintiff fully established that he was a constable.

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Two judgments were shown, one of \$42 21, the other of \$7 50 upon which, the executions were issued under which the plaintiff claims title. The smaller one, I think was good, and full jurisdiction shown in the justice before whom the judgment was obtained. The only question that can be raised is as to the larger one; and as to this, the first question is, did the justice obtain jurisdiction of the defendant therein?

On the trial the docket of the justice, was introduced in evidence. The justice himself was not called. The docket showed that a short summons had been issued against the defendant, dated July 6th, 1869, and returnable on the 9th of the same month, duly served. All that appeared beyond this, on the docket was, "aff. short summons issued." No affidavit was proved or produced, and the defendant therein named did not appear on the return day, but the plaintiff proceeded to obtain judgment on an account, the plaintiff, I think, failed in this, to show jurisdiction in the justice.

A short summons can only be issued against defendants who come within that class of persons, who, by the non-imprisonment act of 1831, now adopted as a part of the provisions in relation to justice's courts, (3 *Rev. Stat.*, 5 *ed.*, 462; §§ 212 to 215), cannot be proceeded against by long summons or warrant. And, that a plaintiff to bring himself within that provision, it must be made to appear to the justice by affidavit. This short summons, therefore is an extraordinary process, and can only issue on proper preliminary proof, and as no jurisdiction is obtained without such proof, a judgment in this inferior court is to be presumed void, until the party upon whom the onus is thrown, supplies that proof. The mere memorandum, "aff. short summons," upon the justice's docket, alone, does not furnish the evidence that the justice had jurisdiction, and as there was no appearance on the part of the defendant, there was no waiver of this objection. The judgment, so far as the

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proof on this trial presented it, was clearly void (*Kelly* agt. *Archer*, 48 *Barb.*, 68, 71 ; *Imbert* agt. *Hallock*, 23 *How.*, 460, and cases cited ; *Barnes* agt. *Harris*, 4 *N. Y.*, 382).

I am, nevertheless, of opinion that the judgment before us ought not to be reversed. When this judgment, now claimed to be void, was offered in evidence, the defendant's counsel being present, not only permitted the docket to be read in evidence without objection, but admitted it to be evidence. This question of the validity of the judgment was not raised on the trial ; the justice's attention was not directed to any want of validity in it ; and it was not made a matter of contest. The justice had a right to assume and take for granted, by the conduct of the defendant and his counsel on the trial, that the justice before whom the judgment was obtained, had jurisdiction of the case.

It is to be presumed after judgment, that if the objection had been taken at the proper time, that the justice who tried the action, or the affidavit to which the docket refers, could have been produced, and the proper evidence been supplied. The justice who tried this action is to be presumed to have tried it upon the implied theory, which the silence of the defendant must be regarded as conceding to be true, to wit, that there was no intent to take exception to the validity of this judgment. It is bad faith towards the party, it is unprofessional on the part of counsel, it is trifling with the court, thus to prosecute or defend actions upon the basis of technicalities induced by bad faith ; and courts should never give countenance to such practice. But it is sufficient here to put the case on the ground, that the party is to be presumed, after judgment, to have waived any objection that he might have taken on the trial, but omitted to take. (*Austin* agt. *Barnes*, 16 *Barb.*, 643 ; *Jenks* agt. *Smith*, 1 *N. Y.*, 94 ; *Duntz* agt. *Duntz*, 44 *Barb.*, 460 ; *Paige* agt. *Fazackerly*, 36 *Barb.*, 395).

I think, therefore, the judgment should be affirmed.

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COURT OF APPEALS.

JAMES E. BIRDSALL, respondent, agt. MARGARET L. BIRDSALL,
appellant.

An application for leave to vacate a judgment and to answer the complaint, is addressed to the discretion of the court below, and whether granted or refused is not the subject of an appeal to this court.

The fact that the court, at special term, granted the relief asked for, and the court at general term reversed the order made at special term, does not bring the order within the class of orders reviewable in this court.

The record upon such an appeal, in both courts, properly consists of the papers upon which the court acted in deciding and making the original order; the case then made is that which is to be reviewed, and the fact of an alleged waiver or abandonment of the appeal which depends upon acts *dehors* the record, can only be brought to the attention of the court on affidavits, and on a motion to dismiss the appeal or for relief against it. And such an application must be made and finally decided by the supreme court.

So an objection taken by the appellant, that the appeal in the supreme court was not heard *in the proper district*, or by a general term which should have heard it. This is a question affecting the regularity of the proceedings in the court below, and a question of practice.

Argued October 28th, 1870, Decided November 22d, 1870.

THIS action was commenced on the 29th of November, 1866, against the defendant, for an absolute divorce.

The venue was laid in the city and county of New York.

On the 30th of November, 1866, the plaintiff and defendant entered into an agreement, as follows:

Memorandum of an agreement entered into this 30th day of November, A.D. 1866, between James E. Birdsall, of the village of Watkins, county of Schuyler, and state of New York, of the first part, and Margaret L. Birdsall, of the city of New York, of the second part, witnesseth: whereas the said James E. Birdsall and Margaret L. Birdsall were united in marriage on or about the 2d day of December, 1851, at the city of Albany, and whereas, the

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said James and Margaret did hereafter, until about the year 1855, live and cohabit together as man and wife, when they voluntarily separated from each other, and have ever since continued to live separate and apart from each other, and the said parties having, as the issues of said marriage, had one child, Scilia Lenora, now aged about eleven years, and the said Margaret has had the care, custody, education and control of their said child since her birth, and whereas, the said James E. Birdsall has become seized of certain real estate, and now owns the same, in which the said Margaret has at present inchoate right of dower: And whereas the said James E. Birdsall has commenced in the supreme court of the state of New York, an action for the purpose of obtaining a decree of divorce from the bonds of matrimony: Now, therefore, in consideration of the covenants and agreements hereinafter contained, the said James E. Birdsall doth hereby covenant and agree to deposit in the hands of Frederick Davis, jr., the sum of one thousand dollars, to be paid to the said Margaret by the said Davis on the said James obtaining a decree of divorce in the said action. In consideration of the said sum the said Margaret doth hereby agree to release all right of dower in the lands of the said Birdsall she may have, and all claims and demands against him of every kind and character, for any support and maintenance, as well as for all claims for the same in the future, excepting and reserving, nevertheless, and this agreement does not include the future support and maintenance of their said daughter, Scilia Lenora, the support whereof the said James E. Birdsall is not hereby absolved from, but so far as the future support, maintenance and education of said daughter is concerned, the provision for her future support remains still unsettled. The said Margaret is to aid the said James in procuring said divorce, so far as the same lies in her power, and the said James is to prosecute the same to judgment with all reasonable dispatch, and so soon as the decree is granted to the said James by the court, giving him an

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absolute divorce, then, and not before, the said Davis is to pay over the said money to the said Margaret. The said Davis is to give the said Margaret a certificate to the effect that the said money is deposited in his hands, together with the further sum of three hundred dollars, to be paid by said Davis on obtaining such decree as aforesaid. The said Davis is also to pay to the said Margaret, in money, on the day of the date hereof, the sum of two hundred dollars. And it is further agreed that this is to be a final settlement of the difficulties of the said parties when this agreement is complied with in all respects; and that on the payment of the said money, the said Margaret agrees to execute to the said James E. Birdsall a release of all her rights of dower in his lands or estate, both vested and such as he may hereafter acquire, which is also made a condition of the payment of the said money by the said Davis.

The said Margaret is not to be compelled to pay any costs of the said action for the divorce so commenced, but is to be fully absolved therefrom; and it is further agreed that the said James E. is also to be absolved from all costs of the action this day commenced against him by the said Margaret for a divorce, and that the said Birdsall is to interpose no obstacle to the said Margaret also obtaining a decree from him, or divorce, but it is understood that the same is to be granted without any other provision whatever.

In testimony whereof the parties have hereunto set their hands and seals, this day and year above written.

JAMES E. BIRDSALL, [L. L.]

MARGARET L. BIRDSALL, [L. S.]

Internal revenue ten cent stamp.

Witness, F. DAVIS, Jr., C. C. MOORE.

In pursuance of this collusive agreement, a judgment of divorce was granted at a special term, held in the city and county of New York, on the 12th of January, 1867.

On the 19th of April, 1869, the defendant made a motion

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at a special term of the supreme court, in the county of New York, to set aside that judgment, and to be allowed to interpose an answer.

This motion was made on an affidavit and papers, showing the fraud perpetrated on her, and the manner in which she was forced to sign the agreement.

On the 8th day of July, 1869, an order was granted at a *special term in New York*, vacating the judgment of divorce, and allowing the defendant to answer.

The plaintiff appealed from this order opening the default, and brought on the appeal before the general term of the sixth district.

The appeal from the order granted in the county of New York, was brought on by the plaintiff, and the order opening the judgment reversed, and the motion to vacate the judgment of divorce granted in the first district was denied by the general term of the sixth judicial district.

E. S. CALDWELL, *for Appellant.*

IRA D. WARREN, *of Counsel.*

I. Such a proceeding was unauthorized. The general term of the sixth district had no power to reverse this order, or to entertain the plaintiff's appeal from the order granted in the first district.

The Code provides (§ 346): "appeals in the supreme court shall be heard at a general term, either in the district embracing the county where the judgment or order appealed from was entered, or in a county adjoining that county, *except that where the judgment or order was entered in the city and county of New York, the appeal shall be heard in the FIRST district.*"

The plaintiff's answer to this appears in the printed papers. He was allowed on the hearing at the general term in the sixth district, against the defendant's objection, to read an affidavit of the plaintiff's attorney, sworn to on the

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14th day of January, 1870, six months after the appeal to the general term was taken, the notice of appeal having been served on the 23d of July, 1869.

That affidavit (which was no part of the papers on the appeal to the general term) states that the special term in New York vacated the judgment and allowed the defendant to answer, and that on the 13th of July, 1869, she served her answer.

On the 19th of July, 1869, the plaintiff served an amended complaint in which Schuyler county was named as the place of trial.

This, he claims, authorized the general term of the sixth district to entertain the appeal.

1st. We say the general term of the sixth district had no right to receive papers on the appeal not before the court below. The appeal is to be heard on certified copies of the papers on file, and such papers alone as were before the court below (*Code*, § 328).

The plaintiff commenced his action in January, 1866, and laid the venue in the county of New York.

The cause was referred in the county of New York.

The testimony taken and a judgment entered in the county of New York, on the 12th of January, 1867.

The judgment was vacated, and the defendant served an answer on the 13th of July, 1869.

On the 19th of July, 1869, the plaintiff served an amended complaint, laying the venue in Schuyler county.

We submit that the service of an amended complaint laying the venue in Schuyler county did not change it from the county of New York.

Section 125 of the Code provides that the *action* be tried in any county, which the plaintiff may designate in his complaint, subject to the power of the court to change the place of trial in the cases provided by statute.

Section 126 provides only two ways of changing the place

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of trial: one is by consent of the parties, and the other by order of the court.

There is no provision in the Code for changing the place of trial by simply amending the complaint.

2d. When the *plaintiff* has designated the county in which he wishes the trial to be had, there is no provision of the Code authorizing him to change it.

3d. When the plaintiff served his amended complaint, he waived his right to appeal from the order opening the default. He could not amend his complaint under that order opening the default, and, at the same time, appeal from it.

The amended complaint is the only complaint in the case, and yet the general term have entirely ignored that, and by their reversal of the order opening the default have upheld a judgment based on a complaint not in the case.

The supposed effect of the plaintiff's novel and hitherto unheard of proceeding was to give the general term of the sixth district the right to review the validity of a judgment entered in the first district.

According to the plaintiff's position, there are two complaints in this case, one conferring authority on the general term to hear the appeal, and the other the basis of their judgment.

After a careful examination of the Code, I am not able to find any provision, of even that liberal instrument, applicable to such an ingenious device, and have never seen or heard of a precedent to sustain such practice, even in divorce cases where some very liberal practice has been tolerated.

II. The court erred in allowing the plaintiff to read the affidavit at fol. 16S and pages 43 and 44.

The appeal was taken to the general term on the 23d day of July, 1869, and the affidavit was made January 14, 1870.

It is an absolute right of a party to have his appeal heard on certified copies of papers used in the court below, and

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the general term had no right to permit any additional affidavits to be read (*Code*, § 328).

1. If the court had a right to receive this affidavit it did not show that the place of trial was Schuyler county, for the reasons before stated.

Hence, the general term of the sixth district had no right to review this case at general term; their action in hearing it was against the express provisions of the code, and in reversing it against all law and precedent, as the question was entirely in the discretion of the judge at special term, who originally opened the default (*Carpenter agt. Carpenter*, 4 *How*, 139).

III. The plaintiff, however, objects to these questions being raised here, because, he says, the record does not show that any such objection was made at the general term.

I am not able to see how it is possible to get such an objection in the record in a case of this kind. We had no right to add anything to the record. It must be heard on certified copies of the papers.

The rule that the objection and exception must appear in the case does not apply to these motions. No objection or exception ever appears on the papers on a motion, or the papers on an appeal from an order.

Our points at the general term show that we took all these objections.

If the general term had ruled out this supplemental affidavit, as they should have done, then, clearly, they had no right to hear the appeal, so that it is not an error that could have been cured in any way.

IV. If the court sees fit to look into the merits of the original motion to ascertain whether the order of the special term in New York was right, they will find that no upright judge could have made any other order.

Suppose when the report of the referee was presented and judgment of divorce asked for, the agreement had been

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presented with it, is there a judge on earth who would have granted a divorce.

It shows on its face that the defendant was compelled to do as she did or starve. She is not to have a cent until an absolute divorce is granted.

Davis receives the money, but agrees not to pay her until the divorce is granted.

These agreements show upon their face the stern necessities which drove the defendant to execute them.

The defendant in her answer denies every charge of adultery made against her.

She does not appear to have been so bad, but the plaintiff's attorney entertained her at his own house.

If the court will look at these agreements and then at the disgraceful letter, written by one calling himself a man, to a woman, the mother of his child, they will be satisfied that the judge at special term did right in opening the default.

We do not propose to go over all the facts embodied in the affidavits in these points, the court will find abundant reason for allowing this defendant to answer.

She finds herself disgraced by the testimony of witnesses procured by the plaintiff, and sworn before the referee, every word of which is false. We suppose, however, this court will not receive the merits on either side.

She only asks to be heard in her defense, and that such an extraordinary proceeding as this shall not be tolerated to her detriment.

V. We ask that the order of the general term of the sixth district be reversed with costs.

B. W. WOODWARD, *for respondent.*

F. KERNAN, *of counsel.*

ALLEN, J.—The application to vacate the judgment, and for leave to the defendant to answer the complaint, was addressed to the discretion of the court below, and, whether

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granted or refused, is not the subject of an appeal to this court, (*Code*, § 11 sub. 4; *Lawrence* agt. *Ely*, 38 N. Y., 42; *Buffalo Savings Bank* agt. *Newton*, 23 N. Y., 160).

The fact that the court, at special term, granted the relief asked for, and the court at general term reversed the order made at special term, does not bring the order within the class of orders reviewable in this court (*New York Ice Company* agt. *Northwestern Ins. Co.*, 23 N. Y., 357).

The statute regulating the jurisdiction of this court, does not authorize the review of orders of the supreme court, arising upon interlocutory proceedings, or upon any question of practice in an action involving *any questions of discretion* (*Code*, *supra*).

Applications of this character for relief against judgments, or other judicial proceedings, either as matters of grace and favor, or for irregularity, are peculiarly addressed to the discretion of the court, and the intention of the legislature, as expressed, is to make the disposition of all questions of practice of that kind, by the court of original jurisdiction, final.

It would not be wise, or for the public good, to suffer all questions of practice, especially those calling for the exercise of discretion, that may arise in the process of litigation, to be taken by appeal to the court of last resort, delaying and retarding the final determination of the matters really in dispute, increasing the expense of litigation, and obstructing the legitimate business of all the courts.

The matters urged here, as bringing this order within the class of appealable orders, do not appear by the appeal papers.

The claim that the respondent here, the appellant in the court below, had, before the argument of the appeal in that court, waived or abandoned the appeal, by acting under and taking the benefit of the order appealed from, even if it could avail to give jurisdiction to this court, cannot be considered upon this appeal.

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The facts upon which the claim is based, do not appear by the record, and could not in any legitimate way, appear there.

The record upon the appeal, in both courts, properly consists of the papers upon which the court acted in granting the original order; the case then made is that which is to be reviewed, and, as the alleged waiver or abandonment of the appeal depends upon acts *dehors* the record, they could only be brought to the attention of the court on affidavits, and on a motion to dismiss the appeal, or for relief against it.

So far as appears by the record, there was no fact before the general term of the supreme court upon which that court was called upon to decide, or could have decided whether the plaintiff was estopped from appealing or had waived his appeal after it was brought.

The affidavit printed with the papers, purporting to have been made on the 14th of January, 1870, long after the appeal was brought, and a few days before the decision, formed no part of the record in the court below, and formed no part of the record sent here; and the counsel for the present appellant is entirely right in his claim, that the affidavit has no place before this court.

But, if it could be considered by us, it would not vary the result.

It would be still, for the supreme court to decide, at least, in the first instance, upon a proper application or presentation of the facts, whether the appeal was properly brought and whether the plaintiff was in a situation to prosecute it. A like difficulty is in the way of considering the other objection taken by the appellant, that the appeal in the supreme court was not heard in the proper district, or by a general term which should have heard it.

This is a question affecting the regularity of the proceedings in the court below, and a question of practice, and this objection, or any objection that could have been taken,

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must be regarded as waived by the appearance, and argument of the appeal by the defendant in the sixth district.

If there was no appearance, and the hearing and decision of the general term of that district was irregular, as is claimed, the remedy is by motion for relief in that court, and not by appeal, and, if there was an appearance, as is conceded, it was a waiver of the irregularity.

If the objections taken were clearly before this court, it is at least doubtful whether they could avail the defendant.

In the *New York Ice Co. agt. N. W. Ins. Co.*, (*supra*), this court held, that the order of the general term, reversing an order of the special term, was not appealable, although the statute gave no appeal to the general term. And if an order made, upon an appeal not authorized by law, was not reviewable, it seems that an order upon an appeal heard irregularly in a wrong district, and after acts by the appellant, which the court might think, if they were proved, and not excused or explained, would operate as a waiver of the appeal, was not the subject of an appeal to this court, if not appealable for any other reason.

It is the character of the order, and not the history of the proceedings, upon or following it, that determines whether it is or is not appealable.

But, without considering this question further, for the reasons before stated, the appeal should be dismissed, with costs.

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SUPREME COURT.

WILLIAM A. SHARPE, appellant, agt. SAMUEL JOHNSON and others, respondents.

A *contract* that the plaintiff is to make, for the defendants, three or four models of a mowing machine *at once and without delay*, means that the work shall be done as soon as it can reasonably be performed by the plaintiff.

Where no price is agreed upon for the models, the law fixes the price at what the articles when made and delivered, shall be reasonably worth.

Such a contract is entire for the making of the three or four models. This leaves it optional with the plaintiff whether he will make three or four—no orders on the subject being given by the defendants. By making *three*, therefore, he completes the contract, as to the amount of work and labor and materials to be done and furnished.

Where it is found as a fact that the first model was made and delivered in time, but that the other two was not made and delivered in time, the defendant by accepting the first model did not become liable to pay for that. That was only part performance. The contract was not performed by the plaintiff so as to entitle him to recover anything, until all three were made and delivered or in readiness for delivery, in pursuance of the entire contract.

Before a party can recover upon a contract he must show that he has performed on his part. If he counts in his complaint simply for work and labor, the other party may defeat the action by setting up as a defense, and proving that the work and labor was done in pursuance of a contract between the parties, which has not been performed by plaintiff.

Fourth Department, General Term, 1871.

Argued November, 1870. Decided, January, 1871.

Before MULLIN P. J., JOHNSON and TALCOTT, JJ.

THIS was an appeal brought by the plaintiff from a judgment in his favor, entered upon the report of Irving G. Vann, Esq., referee, in an action to recover pay for three model mowers, made by the plaintiff for the defendants.

It appeared that on the 2d day of May, 1868, the defendants, who were partners, wrote to the plaintiff asking him if he could make some mower models for them, and stating that they must have three or four *at once*; the plaintiff re-

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plied, under date of May 4th, 1868, that he could make the models for them, and would begin the following Thursday, and closed his letter by saying that: "the matter would admit of no delay and to be useful must be prosecuted rapidly," that the plaintiff made the patterns, which were necessary, in order to construct the models, and on the 31st of July, 1868, completed and delivered the first model to the defendants; that on the 14th of November, 1868, the plaintiff completed two other models of said mower, and shipped them by express to the defendants, who refused to receive the same; that a longer time was required to make the first model than to make either of the others.

The referee reported that the first model was completed without unreasonable delay, but that the other two models were neither of them made at once, as required by the agreement, and not until after an unreasonable time had elapsed, that the two last models were not made in accordance with the terms of the agreement, and that the plaintiff was not entitled to payment therefor; and ordered judgment for the plaintiff for what it was worth to make the patterns and the first model, amounting to \$208 50, no evidence was given as to whether the defendants assented to the continuance of the work after a reasonable time for making the models had elapsed, or not, and no price for the models was ever agreed upon.

N. B. SMITH, *for respondents.*

WM. C. RUGER, *for appellant.*

By the court, JOHNSON, J.—The contract as found by the referee was, that the plaintiff was to make three or four models of a mowing machine, at once, and without delay. It is objected on the part of the plaintiff, that this finding of fact is without evidence to sustain it, and is against the evidence. But, I think, the finding is fully justified by the evidence. This seems to me to be the fair and reasonable

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deduction from the letters, and all the other facts and circumstances attending the making of the contract. The meaning of the contract as found is, that the work should be done as soon as it could reasonably be performed by the plaintiff. The legal nature and character of the contract is not for the sale and delivery of the models by the plaintiff, but for work, labor and materials to be done and furnished by the plaintiff for the defendants, (*Prince agt. Down*, 2 *E. D. Smith*, 525; *Courtright agt. Stewart*, 19 *Barb.*, 455; *Donovan agt. Wilson*, 26 *Barb.*, 138; *Parker agt. Schenck*, 28 *Barb.*, *Stephens agt. Santee*, 51 *Barb.*, 532).

No price was agreed upon for the models, consequently the law fixes the price at what the articles when made and delivered, should be reasonably worth if delivered in time.

The contract was entire for the making of three or four models. This left it optional with the plaintiff whether he would make three or four. It was necessarily at the plaintiff's option whether he would make three or four, as the defendants gave no orders on the subject. It must be deemed to have been left to him to decide on the number. By making three, therefore, he completed the contract as to the amount of work and labor, and materials to be done and furnished. The only question is, whether the work was performed in time. The referee has found as matter of fact, that the first model was completed without unreasonable delay, but that the two others were not made at once according to the contract, and not until after an unreasonable time had elapsed. From this he holds and decides as a conclusion of law, that the plaintiff was entitled to recover the value of the first model, but not for the other two. No such legal result follows from the facts found. According to the facts found, the plaintiff was legally entitled to recover the whole, or nothing. That the contract as found was an entire contract for the making and delivery of three or four machines, cannot, I think, be doubted. It was in no respect divisible, either as to number, time,

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price or day of payment, but the whole were to be made without delay.

By accepting one model which was made in time, the defendant did not become liable to pay for that. That was only part performance. The contract was not performed by the plaintiff so as to entitle him to recover anything, until all three were made and delivered or in readiness for delivery. There is nothing in the agreement from which it can be inferred that it was for separate models, each to be paid for on delivery or as the work progressed. Such being the case, the acceptances of one created no liability whatever unless the entire contract was afterwards performed, or the further performance waived by the defendants before the time for complete performance had expired. (*Paige agt. Ott, 5 Denio, 406*).

Before a party can recover upon a contract he must show that he has performed on his part. If he counts in his complaint simply for work and labor, the other party may defeat the action by setting up as a defense and proving that the work and labor was done in pursuance of a contract between the parties which has not been performed by plaintiff.

In the present case the defendants do not appeal, and the error above suggested is of no consequence, and does not affect the correctness of the judgment, except so far as it may tend to bring out more clearly, and illustrate some error committed against the plaintiff who is the appellant. He cannot of course, and does not complain, that he has recovered a portion of his claim only, when he was not entitled to recover at all. His position is that the recovery is for a part of his claim only, when it should have been for the whole. He insists that he has performed his contract, he has in my opinion fulfilled and performed on his part in all respects, except that of time. Indeed there is no complaint of any other breach. This being the case, his right to recover depended upon the question, whether the defendants

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by their conduct had not waived strict performance in that particular. If they had, the work having been done, the plaintiff was entitled to recover. Though, in such a case, the defendants would be entitled to recoup under a proper answer the damages they had sustained by reason of the non-performance in that particular. The recovery in such case is not upon the contract strictly, but rather upon the implied promise to pay for the work, labor and materials. The cases on this question are quite numerous in our own reports, only a few of which will be cited (*Howell* agt. *Schoeppell*, 4 *Cow.*, 564; *Smith* agt. *Gugerty*, 4 *Barb.*, 614; *Merrill* agt. *The Ithica & Oswego R.R. Co.*, 16 *Wend.*, 586).

The question whether the defendants consented to the continuance of the work, after a reasonable time for making the models had expired, does not seem to have been tried before the referee, and has not been decided by him—what would amount to an assent would be a question of law, where there was no dispute as to the facts. If the evidence was conflicting, it would be a question of fact for the jury or the referee. Here the first model was not delivered until the 31st of July, after the agreement was made, and the defendant accepted it without objection. They certainly had notice then that the plaintiff was engaged in the work. As nothing was said between them at that time on the subject, it is to be presumed the defendants knew the plaintiff was going on with the work, and if they did not object that the time had expired, it will be presumed that they assented to his going on, and doing what was yet necessary to be done to complete the job. It does not appear that the defendants objected to receiving the two last models, on the ground that they had not been made in time. According to the testimony of the defendant, Johnson, he refused to receive the last models on the ground that they had never been ordered by the defendants. It might be presumed in support of the judgment, that the referee had

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found that the defendants did not consent to the continuance of the work after the first model had been sent and accepted, if such finding would support the judgment, but it would have no such tendency, because it is apparent that the case was tried and decided upon an entirely different theory. The judgment would still be inconsistent with the facts found, and that fact in addition.

In such a case, nothing will be presumed that does not appear in the report of the referee. On another trial, if it shall appear that the two last models were not made in due time, according to the true intent and meaning of the agreement, the question of the defendant's assent to the continuance of the work afterwards, can be tried and determined. That question has not been tried or determined as the case now stands. I think, the plaintiff's exception to the conclusions of law, are broad enough to cover this question.

The judgment must, therefore, be reversed, and a new trial ordered, with costs to abide the event.

In re Bunster.

U. S. DISTRICT COURT.

In re H. B. BUNSTER.

An involuntary bankrupt, who has complied with all the provisions of the bankrupt act, can apply for and receive a discharge the same as a voluntary bankrupt. The 33d section of the bankrupt act, as amended July 27th, 1868, and July 14th, 1870, is applicable to proceedings in involuntary bankruptcy. An insolvent, although having assets, and those assets having been duly surrendered to the assignee, but not amounting to the required fifty per cent. of the claims proven against his estate, is not entitled to a certificate of conformity, unless the bankrupt, before, on, or at the time of hearing of the application for discharge, tender or file the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, as required by § 33 of the bankrupt act as amended. In case an involuntary bankrupt does not tender or file the assent of his creditors, or show payment of his debts by the return of the assignee, or that his property and effects equal or will pay fifty per cent., so as to comply with the requirements of § 33 of the bankrupt act as amended, the certificate of conformity cannot be granted.

*Southern District, New York.**Before JOHN FITCH, Register.*

THIS is a proceeding in involuntary bankruptcy. The proceedings in the cause are regular, and according to law, up to and including the return of the order to show cause why the above named bankrupt should not be discharged according to law. Several creditors, who have duly proved their respective claims, have filed notice of their appearance by their respective attorneys, and have a right to file specifications of their grounds of opposition to the discharge of said bankrupt within the time prescribed by the act.

By the schedule, it appears that the debts from which the bankrupt seeks to be discharged, were contracted since January 1st, 1869, which brings this case within the provisions of the amendment to § 33 of the bankrupt act, approved July 27th, 1868, which reads as follows :

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“That the provisions of second clause of the 33d section of said act, shall not apply to the cases of proceedings in bankruptcy, commenced prior to the first day of January, 1869, and the time during which the operation of the provisions of said clause is postponed, shall be extended until said first day of January 1869. And said clause as amended July 14th, 1870, reads as follows: “In all proceedings in bankruptcy commenced after the first day of January, 1869, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, be filed in the case at or before the time of the hearing of the application for discharge.”

Several creditors have duly proved their claims, amounting in the aggregate to the sum of \$32,063 08 and the assets to \$10,000, as appears by the certificate of the assignee. The bankrupt has not shown that his assets equal in value, since the adjudication of bankruptcy, fifty per cent. of the debts proved against his estate, as required by law, or that they will do so.

Counsel for the bankrupt upon all the proceedings in the case, applies for the usual certificate of conformity. He does not offer or tender the assent in writing of a majority of his creditors who have proved their claims, nor any of them, as is required by said § 33 neither does he ask for an adjournment of the order to show cause, but applies for a discharge and the usual certificate of conformity, and claims as a matter of law that said § 33 is not applicable to an involuntary case, and only applies to voluntary bankruptcy, and that he is entitled to the certificate of conformity without filing proof that his assets equal fifty per cent., or filing the assent of a majority of his creditors, both in number and value, as required

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by law. That the bankrupt, being an involuntary bankrupt, has the same right to apply, under § 33 as amended in 1868, for a discharge as if he was a voluntary bankrupt.

That he having been declared a bankrupt by this court, and having delivered up all his property and effects, both real and personal, to the assignee, he is entitled (the assignee not opposing) to his discharge.

That any other construction of § 33 might be the means of transforming the statute from a liberal one to a very harsh one, inasmuch as it might put it into the power of a few of the principal creditors to utterly preclude the bankrupt from obtaining a discharge, although he had in good faith surrendered all his effects to the assignee, and that in this case the bankrupt is entitled to his discharge without the consent of a majority of his creditors, or the payment of fifty per cent in value, as required by § 33. The bankrupt, by his counsel, not only declined to ask for but positively refused an adjournment of the order to show cause to some future day, which I was willing to grant in order that if the district court decides that said assent was necessary, the same, if possible might be obtained. The bankrupt claims that he can apply at any future time for permission to file the assent of his creditors to his discharge, and that his failure to do so on the return day of the order to show cause, does not prejudice any of the proceedings already had, and may show assets equal to fifty per cent.

I certify that in the course of the proceedings in this cause now pending before me, the following questions arose pertinent to said proceedings, and were stated and agreed to by counsel for the bankrupt, and also by counsel for creditors, and requested the usual certificate to the district court :

I. Can an involuntary bankrupt apply for a discharge under any of the provisions of the bankrupt law ?

II. Is the thirty-third section of the bankrupt act as

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amended July 27th, 1868, and July 14th, 1870, applicable to proceedings in involuntary bankruptcy ?

III. Can an involuntary bankrupt whose assets have been surrendered to the assignee, but without proof that the assets equal or amount to fifty per cent. of the amount proved against his estate, be discharged without the assent of a majority in number and value of his creditors, who have proved their debts, &c., as required by said § 33 of the bankrupt act as amended, having been filed in the case at or before the time of the hearing of the application for discharge ?

IV. Can the certificate of conformity be granted in an involuntary case, when the assets do not equal fifty per cent. of the claims proved, which accrued subsequent to January 1st, 1869, and the bankrupt does not file an assent of the majority of his creditors who have proved their claims, &c., as required by the aforesaid section of the bankrupt act as amended ?

V. Can a bankrupt who neither pays the fifty per cent., and who does not prove that his assets equal or amount to that sum, and who does not tender or file the required assent, apply again for a discharge under and by virtue of the order to show cause, unless the return day of the order to show cause has been adjourned ?

The bankrupt act prescribes a particular and specific code of procedure or practice which the bankrupt must comply with before the question as to whether he is entitled to a discharge can be entertained by the court.

In this case the bankrupt has complied with all the requirements of the bankrupt act, with the exception of paying fifty per cent. of the amount of debts proved against his estate, or showing that they equal or amount to fifty per cent., or filing an assent in writing of a majority in number and value of his creditors who have proved their debts to his discharge, without regard to the percentage which may be realized from his estate.

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That § 33 of the bankrupt act expressly provides that a bankrupt may be discharged if he files such an assent on or before the return day of the order to show cause why he should not be discharged ; consequently, if he fails so to do, and his estate does not equal or amount to fifty per cent. of the debts proved, the court cannot entertain his motion or application for a discharge.

From the scope and tenor of the bankrupt act it appears to have been founded upon the idea and principle, that unfortunate debtors should be released from their pecuniary contracts (except those fraudulently contracted) by a general law, in conformity to article one, § 8, of the constitution of the United States. Such a general law is the bankrupt act of Congress, approved March 2d, 1867. Involuntary bankruptcy did not originate with the act of Congress approved March 2d, 1867, as the State of New York has for years her statute enactments, whereby imprisoned and insolvent debtors were discharged both from imprisonment and from their debts ; the act entitled, "an act to abolish imprisonment for debt, and to punish fraudulent debtors," passed April 26th, 1831, and the several acts amending the same ; the Massachusetts insolvent laws, the English bankrupt act, together with § 1 of the bankrupt law of 1841, which act of 1841 took effect February 1st, 1842, resembled, in this particular, the English bankrupt act (6 *George IV*, 16).

By the act of 1841, it was provided that any person so declared a bankrupt at the instance of any creditor, may petition the court, &c., and upon complying with the provisions of the act of 1841, was discharged in the same manner as the insolvent who applied by petition, from all debts which "shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any fiduciary capacity."

The practice as to the commencement of proceedings under the act of 1841, and also under the act of 1867 were

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different in voluntary and involuntary cases up to the adjudication; then they were united in both manner and form of procedure, and to the manner of application for discharge. In this district, under the act of 1867, both class of cases have uniformly been granted the same relief, no distinction having been made. The inference is fair, that had Congress intended to take, by virtue of § 39 of the bankrupt act, the property of an insolvent, dividing it among his creditors and not have afforded him any relief and denying him a discharge, similar to the one given to a voluntary bankrupt from his debts, that an express provision refusing such a discharge would have been contained in the act. But we are not left to doubt or conjecture on that point, neither must we decide the question by implication, as § 32 of the act of 1867, in providing for a discharge under and by virtue of the act, uses the words, "the bankrupt," thus, by the ordinary acceptation of the words, includes both a voluntary and involuntary bankrupt. The discharge in form, as set forth in § 32 of the act of 1867, in describing the bankrupt, also in reciting the proceedings had, uses the words, "on which day the petition for adjudication was filed by or against him," the words "or against" are in parenthesis, thereby clearly indicating that the words "or against" were put in the act for the express purpose of showing that a person against whom a petition in bankruptcy had been filed was entitled to a discharge the same as one by whom a petition had been filed by himself. The words, "on his own application," when taken in connection with §§ 36 and 37, all seem to tend to the conclusion, that after the adjudication, the practice and relief, as to both voluntary and involuntary proceedings, should be the same, subject, however, to the provisions of § 39 of the act. *In re Clark*, (3 B. R., 3), and *in re Dibblee* (2 B. R. 185), seems to be decisive on this point, and is in accordance with the uniform practice of the United States district courts throughout the United States. An involuntary as well as a voluntary bankrupt may

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apply for a discharge (*Gazzam on Bankruptcy*, 2d ed., 134; *Bump on Bankruptcy*, 3d ed., 214).

It was the avowed determination of congress, in passing the bankrupt act, to destroy and eradicate the unjust, oppressive and improper system which had become so prevalent, and an evil too greivous for honest men to bear, by which insolvent debtors could, under state laws, pay whom they choose, and cheat and defraud all others. By means of confessions of judgment, conveying, transferring real estate or assignments, mortgages on real and personal property, and other means, prefer their friends, and render the administration of the laws for the collection of debts, a mere farce. But now all is changed since the passage of the bankrupt act, which has suspended the state insolvent laws, *ipso facto*, as soon as it took effect. (*Commonwealth* agt. *O'Hara*, *B. R. sup.* 9; *Van Nostrand* agt. *Carr*, 2 *B. R.*, 154; *Perry* agt. *Langley*, 1 *B. R.*, 155; *Martin* agt. *Berry*, 2 *B. R.*, 188; *Conner* agt. *Miller, et al.*, 1 *B. R.*, 98). No preference can be given to relatives or friends; each creditor who proves a claim shares with the other creditors, all receiving their *pro rata* share alike.

This is just and equitable, and in accordance with the true principles of justice and equity, of which all honest men approve.

The views of the bankrupt's counsel in this case are not sound. Bankrupts are no worse off if their property is equally divided, than they would be if (as in this case) it had been taken on execution by a creditor, upon a judgment in a state court. It is better for the bankrupt that his property be equally distributed, and he be discharged by assent of his creditors, (as he probably would be) for creditors are usually lenient when an insolvent is honest, (and usually sign the assent to his discharge when requested to do so), than to be left hopelessly insolvent, and not relieved by the decree of this court.

I fail to see any just or valid ground upon which a

bankrupt can be discharged without complying with the requirements of § 33 as amended; and I also fail to see any legal grounds upon which the case, (*Replier* agt. *Bloodgood*, 1 *Sweeny*, 34), was decided. The court in that case held, that an involuntary bankrupt could not apply for a discharge, and says: Section 35 of the act, declares void all securities or contracts made or given in order to induce any creditor to forbear opposing the application for discharge of the bankrupt. But in this involuntary proceeding, taken by a creditor against the bankrupt, there is not, nor can there be any application for discharge of the bankrupt. The statute provides no method or means whereby a bankrupt can apply for a discharge in a proceeding hostile to him, instituted by a creditor. In this respect, as well as others, the United States law differs from the English bankrupt statutes." In this respect Judge FITHIAN, who delivered the opinion of the court, mistook the tenor and effect of the English bankrupt law in proceedings to be taken for the discharge of the bankrupt, and in any proceedings which may be instituted against a bankrupt under the English bankruptcy act of 1869, must be had under §§ 48 and 49 of the act, whether the proceedings have been instituted by or against a bankrupt, and are similar to the proceeding under § 33 of the bankrupt act, part 1, adjudication in bankruptcy, of the English bankrupt act of 1869. (32 and 33, *Vict. C.* 71).

"An act to consolidate and amend the law of bankruptcy" contains similar provisions in regard to proceedings in cases of involuntary bankruptcy, &c., to sections 39 and 40 of our bankrupt act. The English bankrupt act applies for the most part to cases of involuntary bankruptcy.

In § 33 of the bankrupt act as amended, the following words occur, to wit: "In all proceedings in bankruptcy." It is difficult to perceive how a court can construe that sentence so as to annul and ignore the word "all," and confine the privilege of a discharge to voluntary

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bankrupts alone. The section, as a whole, and the sentence aforesaid, is unmistakable and precludes the idea of any distinction between voluntary and involuntary proceedings, or that it denies to the involuntary bankrupt the relief afforded to the voluntary bankrupt. That would be a hardship, and leave the bankrupt, where the state laws do, an insolvent, after the taking of his property by execution, and deny him the relief afforded by the bankrupt act, which was intended as a palliation for the harsh remedy of involuntary bankruptcy.

The bankrupt act is two fold in its operations, it being an insolvent as well as a bankrupt act. It has the same scope and effect as an insolvent law as the state acts had, and acts upon the same cases and persons, suspending the state insolvent laws as per article 6, section 2 of the Constitution of the United States.

An involuntary bankrupt has few, if any, of the equities in his favor which can be claimed by a voluntary bankrupt. One of the elements of fraud in bankrupt proceedings, as set forth by Judge BLATCHFORD, *in re Lowenstein*, (2 B. R., 99), is, that the involuntary bankrupt has not done what he should have done, *i. e.*, filed his petition in bankruptcy. The law, by adjudicating him bankrupt, has determined his status, and by virtue of such adjudication he has been forced to do what he should have done of his own free will. That his property has been taken forcibly only shows that the law has been compelled to use force to compel him to do his duty. The bankrupt cannot question the propriety or justice of the law in having compelled him to do his duty. Instead of its being a reason in favor of, it is rather a reason against his discharge. As the law magnanimously overlooks his delinquency in not filing his petition—as the law requires—and provides that he may, nevertheless, receive a discharge, if he will only comply with the same terms that are required of a voluntary bankrupt, he should gladly comply with and accept the same,

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not as a right, but as a favor granted him, thus giving him a legal, but not a moral, release from his pecuniary obligations. It has ever been a cardinal rule of moral honesty, that a debtor cannot be released from a moral obligation to pay a debt, except upon the payment of the same, or in some way or manner satisfying the creditor; nothing else can exonerate the conscience of the debtor, or discharge the moral obligation created by contracts between man and his fellow-man.

I am clearly of the opinion that if an adjournment is not had upon the return day of the order to show cause, &c., no further proceedings can be had under or by virtue of that order; and if, upon that day, the bankrupt fails to show the payment of the fifty per cent., or that his property and effects were equal to fifty per. cent. of the claims proved against his estate, upon which he shall have become liable as principal debtor upon the debts created since January 1st, 1869, or unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, be filed in the case at or before the time of the hearing of the application for discharge.

In construing and administering the act, courts should be guided by the judicial decisions and precedents founded upon the enactments of a similar nature, by the courts of England and of the various states of the United States; also follow the rules as laid down in the elementary works upon the construction of statutes. In doing so they give form, force and solidity to judicial proceedings, as well as carry out the evident intention of the lawmakers. Any other rule would create the most interminable confusion, conflict of authority and of decisions,—the same as have arisen under the ill-digested and unintelligible code of procedure of this state—and entail upon the whole country the curses inflicted by the code of procedure, and the conflicting decisions thereon by the courts of this state, a calamity which all who are

required to construe and administer the bankrupt act should endeavor to avoid.

I. I decide that an involuntary bankrupt, who has complied with all the provisions of the bankrupt act, can apply for and receive a discharge the same as a voluntary bankrupt.

II. That § 33 of the bankrupt act, as amended July 27th, 1868, and July 14th, 1870, is applicable to proceedings in involuntary bankruptcy.

III. That an involuntary bankrupt, although having assets, and those assets having been duly surrendered to the assignee, but not amounting to or being equal to the required fifty per cent. of the claims proven against his estate, is not entitled to a certificate of conformity unless the bankrupt before, on, or at, the time of hearing of the application for discharge, tender or file the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, as required by § 33 of the bankrupt act as amended.

IV. That a certificate of conformity cannot be granted in an involuntary case, where the debts accrued subsequent to January 1st, 1869, and when the assets do not amount to fifty per cent. of the claims proved, and also the bankrupt does not, upon the hearing of the application for discharge, tender or file an assent in writing of the majority of his creditors in numbers and value to whom he shall have become liable as principal debtor, and who have proved their claims, in accordance with § 33, as amended.

V. That in case an involuntary bankrupt does not tender or file the assent, or show by the return of the assignee, the payment of, or that his property and effects amount to, equal, or will pay fifty per cent., so as to comply with § 33 of the act as amended, the certificate of conformity cannot be granted, and that unless an adjournment is had, all the proceedings under the order to show cause falls, and the

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bankrupt is virtually out of court, and can only be reinstated or relieved by the court in its exercise of its general common law and equity jurisdiction conferred upon it by article three, § 2 of the constitution of the United States.

This case brings up the question as to the discharge of an involuntary bankrupt under the provisions of the bankrupt act. As yet there has not been any express adjudication by any of the United States courts as to the true meaning and intent of § 33 of the act, as amended; and as the superior court of this city, at general term, has decided that an involuntary bankrupt cannot be discharged at all, and that inasmuch as the counsel for the bankrupt is so decidedly of the opinion that an involuntary bankrupt is entitled to a certificate of conformity and a discharge, upon the production of the certificate of the assignee that the bankrupt has surrendered to the assignee all his property, as required by the bankrupt act, and without the payment of fifty per cent. or assets equaling fifty per cent., &c., and although his assets do not amount to or equal fifty per cent., &c., &c., the counsel for the bankrupt makes this application in good faith, firmly believing that his views are correct.

The several counsel for the opposing creditors also claim that they are correct in entertaining the opposite view of the act. All desire that the district court should pass upon the questions.

BLATCHFORD, J.—I concur fully in the five conclusions of the register, except that I do not decide that the bankrupt, when out of court, the case put in the fifth conclusion, can be reinstated or relieved by the court.

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SUPREME COURT.

SILSBEE and others agt. MARY E. SMITH, and others.

A plaintiff who seeks to obtain an *account of the personal estate* which came to the hands of an administratrix—she being dead, her *personal representatives* are indispensable parties.

And the persons who are in possession of the lands sold by the surrogate to pay the testator's debts, are interested in having the administratrix, representatives made parties to the end that it may be established, if it can be, that debts of the testator were unpaid at the time the order of the surrogate to sell was made.

An offer to pay whatever may be found due upon the mortgages is an indispensable averment in a bill to redeem, or a tender of an amount which the plaintiff concedes to be due. Without one or the other of these averments, the complaint does not state a cause of action.

Fourth Judicial Department, General Term, March, 1871.
Before MULLIN, P. J., JOHNSON and TALCOTT, JJ.

APPEAL from an order of special term on demurrer.

By the court, MULLIN, P. J.—There is but a single count in this complaint, and upon the facts alleged in it, the plaintiffs demand as relief, that the sales of real estate owned by the testator, Ziba, W. Cogswell at the time of his death and devised by him to his widow for life, made by the surrogate, on the petition of his widow who was appointed administratrix with the will, an order to pay the testator's debts, should be set aside as irregular and void; the sales of portions of said real estate in foreclosure of mortgages given thereon by the testator should also be set aside for irregularity, and that certain other mortgages be set aside—that deeds of portions of the lands sold as aforesaid be set aside as fraudulent; for an accounting by the administratrix with the will annexed be ordered; that account of the rents and profits received by the widow of the testator during her life be also directed,

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as well as of the assets which came into her hands as administratrix. And that an account of the rents and profits since, the death of Mr. Cogswell be also taken to the end as I infer, that the real estate which descended to the heirs on the death of the widow, may be relieved from the lien of the debts owing by the testator in his life time.

The plaintiffs do not, in terms, ask to redeem the lands from the liens remaining unpaid thereon, but such was doubtless the intention of the plaintiff's counsel, but there is no offer to pay such liens, should anything remain unpaid after applying the amount arising from the sale of the personal estate and from the income of the real.

1st. In order to obtain an account of the personal estate which came to the hands of the administratrix, she being dead, her personal representatives are indispensable parties.

Those defendants who are in possession of the land sold by the surrogate, to pay the testator's debts are interested in having Mr. Cogswell's representatives made parties, to the end that it may be established, if it can be, that debts of the testator were unpaid at the time the order of the surrogate to sell was made.

2d. An offer to pay whatever may be found due upon the mortgages, was an indispensable averment in a bill to redeem, or a tender of an amount which the plaintiffs concede to be due, without one or other of these averments, the complaint does not set forth a cause of action, (*Beekman agt. Frost*, 18 *Johns.*, 544; *Frost agt. Beekman*, 1 *Johns. Ch.*, 288).

There is a misjoinder of causes of action in the complaint, and this misjoinder has led to bringing in parties proper as to one cause of action, but wholly unnecessary as to several others.

This mingling of causes of action is claimed to be analogous in principle to that which permits, in creditors bills, making sundry debtors, or fraudulent assignees, or grantees of the judgment debtor, parties defendant. But there is

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no analogy in the cases. The creditors bill has but one object, the satisfaction of the debt. And all who are liable to contribute to that object are proper parties.

But in this case, the objects of the action are numerous, and in some respects inconsistent. Such pleading cannot be sustained.

The order appealed from is affirmed, with leave to plaintiffs to amend on payment of costs of the demurrer and of this appeal, within twenty days after service of copy of the order.

Goodyear agt. Vosburgh.

SUPREME COURT.

JARED GOODYEAR agt. ELIJAH M. VOSBURGH.

There is no case which holds that the *clerk's* name is essential to the validity of a *commission* issued to take testimony.

Where the commission is issued by the authority of the court, the signature of the judge is sufficient, without the signature of the clerk.

Where the return of a commissioner shows, that the witness was duly and publicly sworn, pursuant to the directions "hereunto annexed and examined," with a reference to the provisions of the Revised Statutes, which are annexed and constitute a part of the commission, the return is sufficient. There is nothing in the statute which requires a separate *certificate*.

Where the Statute has been substantially complied with in the return, the deposition should not be excluded, except upon the clearest grounds of error, amounting to something more than a mere irregularity.

Where the *stipulation* between the attorneys authorized the plaintiff's attorney to direct upon the back of the commission the manner in which it should be returned, and that the commission and deposition "shall be returned by mail to S. Estes, Esq., clerk," &c; and the plaintiff's attorney did direct that the commission be returned to the county clerk, but did not direct that it should be returned by mail; but it appeared that *in fact* it had been returned by mail in pursuance of the stipulation.

Held, that the stipulation did not require that the attorney should direct *in terms* that the commission should be returned *by mail*, but generally the manner in which it should be returned, and, in accordance with this, a direction was made to return it to the county clerk. This was a compliance with this provision of the stipulation, as to the manner of the return. The omission to state that it should be returned by mail, did not, of itself, violate the terms of the stipulation and vitiate the deposition.

But even if it was erroneous, the error is substantially obviated by a compliance with another provision of the stipulation that it shall be returned by mail.

Third Judicial Department, Plattsburgh, General Term, July, 1870.

Before MILLER, POTTER and PARKER, JJ.

EXCEPTIONS ordered to be heard in the first instance at the general term. The case was tried at the Otsego circuit in January, 1870, before one of the justices of this court and a jury.

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The action was brought for entering upon land, consisting of a wood lot of about fifty acres, on lots 191 and 192 of Wallace patent, in the town of Oneonta, and cutting down and carrying away pine timber. The answer justified under an alleged title of the wood lot in the wife of the defendant. The plaintiff claimed title under an assignment of a lease of the wood lot made by John and Nicholas Beams, on the eleventh day of November, 1833, and a written bill of sale by which John and Nicholas Beams conveyed the timber standing upon the fifty acres in question. James G. Walley was the subscribing witness to both of these instruments. No question was made that his signature to the assignment of the lease was not genuine, but the principal question of fact litigated on the trial was whether the name of Walley attached as a witness to the bill of sale was really his signature. Upon this question a number of witnesses was sworn on both sides, and objections were made to the admission of evidence and exceptions taken to the ruling of the justice, which are discussed in the opinion. The deposition of Nicholas Beams taken under a commission was also offered in evidence, objected to and excluded, and exception taken, which is also discussed in opinion. The jury, after the charge of the judge, rendered a verdict in favor of the defendant, and the court stayed proceedings upon the verdict, and ordered the exceptions to be heard in the first instance at the general term.

E. COUNTRYMAN *for plaintiff.*

L. L. BUNDY *for defendant.*

By the court, MILLER, P. J.—It is insisted by the defendant's counsel, that the court erred upon the trial in rejecting the deposition of Nicholas Beams taken upon commission in the state of Wisconsin. The grounds of objection urged to the admission of this testimony are: 1st. That the

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commission was a nullity without the signature of the clerk. 2*d*. That the direction of the commission omits to state the manner in which it shall be returned; and 3*d*. That there was no sufficient return by the commissioner. It was stipulated between the attorneys, that the plaintiff's attorney might "direct upon the back of said commission the manner in which said commission shall be returned," and that the commission and deposition "shall be returned by mail to S. Estes, Esq., clerk," &c. The plaintiff's attorney did direct that the commission be returned to the county clerk, and the court rejected the deposition upon the sole ground, that he failed to comply with the stipulation by directing that it should be returned *by mail*. It appeared that the commission had in fact been returned *by mail*, in pursuance of the stipulation. The objections urged to the introduction of this evidence are purely technical in their character, and therefore unless they can be sustained by the application of strict rules, cannot be upheld.

The commission was issued by the authority of the court, and the signature of the judge was sufficient (2 *Wh. Pr.* 3 *ed.*, 320, 321), without the signature of the clerk. It would be more in accordance with the forms in the books, if the clerk's name had been signed, but this is purely formal. There is no case which holds that the clerk's name is essential to the validity of the commission, and this objection is not well taken, nor is there any valid objection to the return of the commissioner. It shows that the witness was duly and publicly sworn pursuant to the directions hereunto annexed "and examined" &c., thus referring to the provisions of the Revised Statutes (2 *R. S.*, 304, § 16), which were annexed and constituted a part of the commission and thus conforming substantially with its requirement. There is nothing in the statute which requires that there should be a separate certificate, and I have been unable to discover any decision which holds, that where the depositions show that the statute has been substantially followed, that the

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deposition should be excluded. *Bailiss* agt. *Cochran*, (2 *Johns.*, 417), which is cited by the defendant's counsel holds that the statute must be complied with, the objection being in that case, that it did not appear that this had been done which is not the fact in the case before us. In *Fleming* agt. *Hallenbeck*, (7 *Barb.*, 271), which is also relied upon, it was decided that the deposition taken under a commission could not be received in evidence, unless the return of the commissioners is indorsed on the commission, and that it is not a compliance with the statute, for the commissioners to make return upon a separate piece of paper, and annex it to the commissions or depositions. The return was not indorsed in the case last cited, while in the case at bar, the commissioner has indorsed on the back of the commission the words, "the execution of this commission appears in certain schedules hereto annexed," and signed his name as commissioner, thus strictly and in every sense complying with the statute, as the papers accompanying the return show, that the witness was properly sworn and examined, and that the proper oath was administered. While care should be taken in conforming to the provisions of the statute, so as to prevent imposition and fraud when testimony is taken in this form, it will not do, to invoke a rule so strict and technical, that it can scarcely ever be enforced without depriving the party of the benefit of the deposition. It is enough, I think, in these cases, that the statute has been substantially carried out, and where this has been done, the party objecting should not be permitted upon a trial in court, to exclude this species of evidence, except upon the clearest grounds, and something beyond a mere irregularity.

The remaining objection relates to the omission of the attorney to direct that the commission be returned by mail. This was the ground upon which alone it was rejected upon the trial, and the judge stated he had some doubt as to this point, and must therefore hold that it was not properly in

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court, and could not be read. The stipulation did not require that the attorney should direct *in terms* that the commission should be returned *by mail*, but generally the manner in which it should be returned; and, in accordance with this, a direction was made to return it to the county clerk. This was a compliance with this provision of the stipulation. It directep the *manner* in which it should be returned, when it stated the *person*, his official title, and place of residence; and the omission to state that this should be done by mail does not of itself violate the terms of the stipulation and vitiate the deposition. But even if it was erroneous, is not the error substantially obviated by a compliance with another provision of the stipulation that it shall be returned by mail? It is evident that the direction on the commission in connection with the subsequent agreement that it "shall be returned by mail," contemplated a return in no other manner, and if taken together, as I think they should be, they establish that the commission was properly executed. It was enough to direct generally to the clerk, in connection with the express provision as to how the papers were to be forwarded. Had the stipulation been annexed to the commission there would be no doubt about it whatever; and it does not, in my opinion, alter the case because it is on file. A complete answer to the objection is, that a direction was given, and that the stipulation was complied with. The defendant's attorney stipulated that it might be sent by mail, and it was done accordingly. Does it lie then in his power to repudiate the stipulation, and say, that it has been fulfilled, but you did not give as full directions as might have been given? I think not, and inasmuch as this commission has been forwarded exactly according to the agreement, I cannot resist the conclusion that the defendant has waived the alleged informality. We have been referred to a number of cases, which very properly hold that the Statute must be complied with, and I have examined them with some care to ascertain whether

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they were inconsistent with the admissibility of the deposition in this case under the stipulation, and have arrived at the conclusion, that many of them are in conflict with the views I have expressed.

In *Richardson* agt. *Gere* (21 *Wend.*, 156) there was a direction on the commission to return to the clerk, without specifying that it should be returned by mail, and it was held that it was improperly sent *by mail*. The court say it is clear that the return *by mail* is admissible *only* by the permission of the officer in the exercise of his discretion." It will be seen that the return in this manner could only be made by some authority which was not given, while in the case now considered it was done by *express stipulation*, which obviates the difficulty. In *Smith* agt. *Randall* (3 *Hill.*, 495) it was decided that a justice of the peace, on issuing a commission to examine witnesses, must direct *the manner in which it shall be returned*, and, if he omit to do so, the deposition cannot be read in evidence. Here was neither directions or a stipulation, and there is no doubt of the soundness of the rule laid down (*see* 1 *Wend.*, 249).

In *Hull* agt. *Barton* (25 *Barb.*, 274), where the commission was issued out of a justices court, and it was held that when the body of the commission contains an explicit direction in respect to the return of such commission, this is sufficient, although there be *no direction indorsed on the back of it*. By parity of reasoning, when the stipulation shows how the commission should be returned, it is enough, and the case cited sustains the position that it should control.

In *Crawford* agt. *Loper* (25 *Barb.*, 449) it was decided that the direction as to the manner of returning a commission must be signed by the officer settling the interrogatories, otherwise the deposition cannot be read in evidence. The learned judge says, "This provision cannot be dispensed with, except by the consent of parties." It follows then if they stipulate, that the consent thus given should control.

None of these cases hold, that under the circumstances

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existing here, that a deposition taken under the commission was improper evidence, and I am indisposed to strain a point in rejecting evidence which had an important bearing upon the controversy in this case. While care should be taken that testimony taken in this manner should be given as required by law, I am of the opinion that objections of this character, which do not affect the merits, and at most are mere irregularities, would more properly be presented on motion at special term, and I concur with the remark of MORGAN, J. in *Burrill agt. Watertown Bank and Loan Co.* (51 *Barb.*, 108, 115) that, "mere formal objections to the return of a commission will not, in general, be regarded at the trial, and I think the practice is a good one, which requires the party objecting on such ground, to move the court, before the trial to suppress the deposition, in order to avail himself of them." Such a practice is far better calculated to protect the rights of parties, and should be invoked, so as to limit objections to the competency of the witness, and the admissibility of his evidence, and to cases where the defects are entirely jurisdictional, and cannot be obviated (see *Kimball agt. Davis*, 19 *Wend*, 437, 439; *Union Bank agt. Torrey*, 5 *Duer*, 628; *Zellweger agt. Caffé*, 5 *Duer*, 100; *Sheldon agt. Wood*, 2 *Bosew*, 269, 280, 2 *Wh. Pr.*, 3d ed., 324). The suggestions made in the authorities last cited, as to formal defects are endorsed freely in *Rust agt. Eckler* (41 *N. Y.*, 492, 497), a recent case reported since the argument of the case at bar. In this case, the defendant had abundant opportunity to make such a motion, as several months elapsed after the commission and deposition were filed before the trial. It is apparent that the court erred in rejecting the deposition.

New trial granted, with costs, to abide the event.

POTTER and PARKER, JJ. concurred.

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SUPREME COURT.

EBENEZER S. WILLIAMS, respondent, agt. FRANKLIN K. FRAZIER, appellant.

Where sheep were let by the plaintiff to the defendant, by an agreement in writing, for two years, on certain terms and were to be returned in the same condition as when let, and they were returned by the defendant at the time specified (December 1st, 1868), and the plaintiff inquired of the defendant if they had been with a buck, the defendant represented that they had not, and plaintiff thereupon delivered up the contract and accepted the sheep.

The sheep had, as the proof showed, been with a buck at an improper season, and commenced dropping their lambs during the winter, and a number of the lambs died in consequence, of being dropped in cold weather.

To establish a *measure of damages*, the plaintiff put the question, "What were these sheep worth less by reason of their dropping their lambs earlier than if in proper season?" The question was objected to as incompetent, and not the legal and proper measure of damages. The objection was overruled, and the witnesses answered, \$2 75 each.

This depreciation in value was founded solely, as appeared from their testimony, upon their estimate of the value of lambs in August and September afterwards, as sold to the butchers:

Held, that this evidence was clearly incompetent on the subject of damages. It furnished no foundation for estimating damages on account of the breach of the contract which was claimed. It is altogether too remote, fanciful and speculative to form a standard for estimating damages. It does not touch the diminished value of the animals themselves, but only the increased value of their progeny.

The true criterion, if there was a breach, was, what the animals were worth less at the time for sale in the market, with their true condition known to the purchaser:

Held, also that there was *no breach* of the contract by the defendant. The defendant proved, and it was uncontradicted by the plaintiff, that the sheep when he took them of the plaintiff were in the same condition in regard to their pregnancy, as those he returned, and began to drop their lambs in January, and dropped them in February and March. And the contract was that the sheep were to be returned in the same condition as when taken—which they were in fact.

Fourth Department, General Term, November, 1870.

Before MULLIN, TALCOTT and JOHNSON, JJ.

THIS action was brought in a justice's court, to recover damages for an alleged breach of warranty in a contract for the letting of a number of sheep.

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December 20, 1866, plaintiff loaned to defendant a number of sheep to be returned at the end of two years, in as good condition in all respects as when received, and for the use of which he was to receive from defendant 1lb. 6oz. of wool, per head, each year.

The contract was in writing, and at the expiration of the time, the defendant surrendered the sheep, and plaintiff accepted them, and delivered up the contract. At the time the sheep were returned, the plaintiff asked defendant if they had been with a buck, the defendant represented that they had not, and plaintiff relying on that representation, delivered up the contract and accepted the sheep. The sheep had as the proof showed, been with a buck at an improper season, and commenced dropping their lambs during the winter, and a number of the lambs died in consequence of being dropped in cold weather. To establish a measure of damages, the plaintiff put the following question, "What were these sheep worth less by reason of their dropping their lambs earlier than if in proper season?" This question was objected to as incompetent, and not the legal and proper measure of damages. The objection was overruled and the witness answered \$2 75 each.

The justice rendered a judgment against the defendant for \$21 28, damages besides costs.

The defendant appealed to the county court of Jefferson county, from the judgment of the justice, which court having affirmed said judgment, the defendant appealed to this court.

MOORE & McCARTIN, *for appellant.*

I. The plaintiff was the first witness sworn on the question of damages, when the following question was propounded to him, "What were these sheep worth less by reason of their dropping their lambs earlier than if in proper season?"

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1st. This question was objected to as incompetent and not the legal or proper measure of damages. The court overruled the objection, and held the evidence competent. This ruling was clearly erroneous. The measure of damages in an action for breach of warranty in the sale or exchange of personal property, is the difference between the value of the property, *at the time of the sale*. Considering it as corresponding with the warranty, and its value with the defect complained of. Hence, if it can be held, that a warranty was established in this case, the damages the plaintiff was entitled to recover was the difference between the value of the sheep, considering them as corresponding with the alleged warranty, and their value with the alleged defects at the time of delivery to plaintiff, December, 1868. *Muller agt. Eno*, 4 *Kern*, 597; *Voorhees agt. Earl*, 2 *Hill*, 288; *Cary agt. Gruman*, 4 *Hill*, 625; *Comstock agt. Hutchinson*, 10 *Barb.*, 211; *Richardson agt. Mason*, 53 *Barb.*, 601.)

This witness on his cross-examination said, that he arrived at the damages by estimating what lambs could have been sold for in July or August, 1869, and not what sheep were worth in December, 1868, at the time the lease terminated.

2d. Ebenezer Williams, a son of plaintiff, was the next witness called, and was asked the following question: "What were these sheep worth less, dropping their lambs in February and March, than in proper season?" This question was objected to, overruled, and the witness answered, "I think, from twenty to twenty-four shillings."

On cross-examination, he says: "My opinion of damages is predicated on what lambs are worth in July and August, and not on what sheep were worth last December."

It was clearly a speculative way of arriving at the damages, as both witnesses were estimating what lambs would sell for in July and August, 1869, and the suit was tried in June, 1869. There was no other evidence given on the trial on the subject of damages; and thus it will be seen,

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there was not a word of competent evidence on the question of damages in the case.

1st. Because the inquiry did not call for the true rule or measure of damages.

2d. It should have been confined to the time of sale.

3d. The witnesses were not shown competent.

II. The evidence in the case does not establish a contract of warranty. The plaintiff must allege the existence and terms of an implied warranty as explicitly as in case of an express warranty. This he failed to do (*Prentice agt. Dike*, 6 *Duer*, 220).

The learned judge who decided the case in the court below, says in his opinion, "There is no dispute, that the rule of damages is the difference in value of the sheep, if in the condition that the defendant warranted, and their value in the condition in which they, in fact, were," and then adds, that he thinks the question asked was "tantamount to this."

The difficulty with this decision is, that it is directly in conflict with a series of decision from the case of *Voorhees agt. Earl*, (2 *Hill*, 288), down to the present time. And the only case cited by the learned judge, in his opinion, (53 *Barb.*, 601), holds directly the contrary of this new rule of evidence.

III. The contract being in writing, and the sheep having been returned and delivered on the day they were due by its terms, and the contract surrendered up, such delivery and surrender were an acceptance, and satisfaction of said contract, and the plaintiff cannot recover upon it.

IV. The contract was in all respects, fulfilled. The proof showed, that the sheep were returned in the same condition in regard to pregnancy as when receive from plaintiff Hence, the contract was not broken.

W. C. THOMPSON *for respondent*.

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I. The ewes began dropping their lambs in February and through March, and in consequence of the inclemency of the weather the lambs were lost.

If defendant had spoken truly, the plaintiff might have refused to receive them, or could have butchered the sheep and not kept them; but he kept them on defendant's representation. The plaintiff received the sheep upon the assurance of the defendant, which assurance was false in fact; hence, there was a warranty, and breach of it.

II. The sheep began dropping their lambs three months earlier than defendant's assurance. The question, "How much less were these sheep worth by reason of dropping their lambs earlier, than if in proper season?" was equivalent to asking how much less were the sheep worth by reason of their not having been as warranted. The question was within the rule laid down by all courts on this subject.

By the court, JOHNSON, J.—Assuming that the contract had been broken by the defendant, as alleged, "in not returning the sheep in as good condition as when let," which seems quite doubtful upon the evidence; still the judgment cannot be sustained. The contract between the parties was in writing, and by it the sheep were to be returned on the first day of December. They were returned on that day, and the plaintiff after examining them, accepted them as a fulfilment of the contract, and surrendered the contract to the defendant. The contract had been kept by the plaintiff, and he gave it up to the defendant on the return of the sheep as satisfied. The plaintiff claims that when the sheep were returned, the defendant represented to him that no ram had had access to the ewes, when in fact they were in an advanced state of pregnancy, and that had he known their true situation in that regard, he would not have accepted them when returned, and surrendered the contract. The defect in the condition of the sheep, on account of which damages are claimed, is that they were so far advanced in

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pregnancy, that they brought forth their lambs in February and March, which is an improper season, and that in consequence of the lambs coming so early, they could not be raised, but all died. The proper season is shown to be the last of April and the months of May and June. The plaintiff claimed, and by the testimony of himself and his son, sought to prove that the ewes were each worth \$2 75 less than they would have been had they not dropped their lambs at this improper season. This depreciation in value was founded solely, as appears from their testimony, upon their estimate of the value of lambs in August and September afterwards, as sold to the butchers.

This evidence was objected to by the defendant when given, and he moved to strike it out after it was given, as an improper measure and basis of damages, but his objection and motion were overruled by the justice. This evidence was clearly incompetent on the subject of damages. It furnished no foundation for estimating damages, on account of the breach which was claimed. It assumes that the ewes were by the contract, to be returned in a condition to bring forth lambs at the proper season, and that the lambs when thus brought forth would all have lived, and in August and September thereafter have been in a fit condition for the butcher, and of the value of \$2 75, which the plaintiff had sold his lambs for, that season. This is altogether too remote, fanciful and speculative to form a standard for estimating damages. It involves too many contingencies, and does not touch the diminished values of the animals themselves, but only the increased values of their progeny. The true criterion, if there was a breach, was what the animals were worth less at the time for sale in the market, with their true condition known to the purchaser. There was no evidence on that subject, except it was shown by the plaintiff's son, that ewes which dropped their lambs thus early were worth more the succeeding Fall to sell to the butcher than those which dropped their lambs as late as May and June. This

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was also evidence tending to show that lambs dropped thus early were worth more, if raised in August and September, than if dropped in May or June.

But the plaintiff gave no evidence to show what condition the sheep were in as to pregnancy, when let to the defendant, whether they were pregnant at all, or whether they were in a condition to bring forth their lambs in February or March, or in May or June. Consequently, there was nothing on his part to show affirmatively that the sheep were when returned, in a condition different from the condition they were in when let to the defendant. The defendant, on the contrary, testified, and produced other witnesses to prove, that the sheep when he took them of the plaintiff, were in the same condition, in that regard, as those he returned, and began to drop their lambs in January, and dropped them in February and March. This was uncontradicted by the plaintiff. The contract was that the sheep were to be returned in the same condition as when let.

They were taken to be returned in two years, and if they were returned in the same unfavorable condition as to pregnancy as when received, the contract has not been broken, whatever damages the plaintiff may have sustained by reason of his lambs having come too early for their safety and his profit. The contract, therefore, is not shown to have been broken. But if it had been, the testimony in regard to damages was incompetent and improper. The judgment of the county court and of the justice must therefore be reversed.

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SUPREME COURT.

MARY A. HINES, appellant, agt. THE CITY OF LOCKPORT,
respondent.

The common council of the city of Lockport, have the power and it is their duty to make and repair crosswalks in that city. These are not left to be inferred, but are expressly given and imposed by the charter. And the city is liable for whatever damages individuals may sustain by reason of the omission to keep in repair such crosswalks.

The common council, in addition to the powers mentioned above, have (by their charter), that of commissioners of highways of towns, and under that power it is the imperative duty of the common council to cause crosswalks, &c., to be repaired and if it is not done, the city is liable for any personal injuries to any one by reason of such neglect.

The language of the charter is permissive—the common council may regulate, &c. But this does not authorize the common council to omit, in its discretion to perform the duty, and not be liable for damages resulting from such omission. Such is not the law.

If the common council, in their discretion, make a new street, sidewalk, crosswalk, &c., the same discretion require it to keep them in repair, or become liable for the consequences, in case of neglect.

If the common council desires to exempt itself from liability by reason of the want of funds, it must prove the fact, and unless proved, it is liable.

*Fourth Judicial Department.**Syracuse, General Term, May, 1871.**Before MULLIN, P. J., JOHNSON and TALCOTT, JJ.*

THIS was an appeal by the plaintiff from a judgment entered on report of a referee, dismissing the complaint, with costs. The report of the referee is as follows:

To the Supreme Court of the State of New York:

The undersigned, to whom, by an order dated the 6th day of October, 1870, the issues in this action were referred to the undersigned to hear, try and determine the same, begs leave to report: That he has been attended by the plaintiff and her attorney and counsel, and by the attorneys

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and counsel of the defendant, and has taken the evidence on behalf of the respective parties touching the questions of fact involved, respectively submitted by them on their behalf; and after hearing the arguments of the counsel of the respective parties thereupon, and after due consideration thereupon had, finds and determines as questions of fact.

First. That in August, 1867, Spring street, running northerly and southerly, and Chesnut street, running easterly and westerly, intersecting each other, were public highways in the city of Lockport, and in that month, under the direction of the common council of said city, a plank cross-walk was built across Spring street, along the northerly line of Chesnut street, by the parties deemed by said common council to be benefited thereby.

The east part of the walk was constructed by laying two courses of three-inch oak plank, extending westerly from the sidewalk across the gutter or ditch on the easterly side of Spring street.

The interior edges of these planks were crooked, so as to leave immediately over the gutter an opening between the planks some four inches wide and several feet long, tapering to the extremities. This opening, at the time the walk was constructed, was closed by fitting in a piece of plank, which was fastened with a spike. This crosswalk was built in a proper and substantial manner and was, at the time of its completion, in all respects safe.

About a year after the completion of the walk, the two planks in question became loosened from their fastenings and the piece which had been put in to close up the opening between them was, by some unknown cause, removed, leaving an opening between the planks in question, varying at times, from four to six inches in width, as the planks worked apart after being loosened. This opening rendered the sidewalk in question dangerous to persons passing over it, particularly in the night time.

On the 30th of June, 1870, in the night time and during

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a severe thunder storm, in the darkness, which was great, except when lighted by flashes of lightning, the plaintiff, in passing along the crosswalk in question, without knowing its dangerous condition and without fault or carelessness on her part, accidentally stepped through the opening between the planks in question, into a deep gutter or ditch beneath, which caused her to fall heavily, and to severely injure one foot and leg and one arm and shoulder of the plaintiff.

The crosswalk in question had been in this dangerous condition for about one year prior to the injury of the plaintiff, and its dangerous condition during that time had been plainly visible to all who passed that way in the day time.

The defendant had not been expressly notified of the dangerous condition of this crosswalk before the injury of the plaintiff, but its dangerous condition had existed for so long a time, plainly to be seen by all passing that way, that the defendant had thereby, and before the accident, constructive notice of such condition of said crosswalk.

The injuries received by the plaintiff on the night in question, were not occasioned by nor contributed to by any negligence on her part, but her injuries were aggravated by neglect on her part afterwards. These injuries were not, probably, of a permanent character, but they necessarily caused her much pain for several weeks, during which she was, for a part of the time, confined to her room, and thereby was unable to pursue her usual avocation. She was a painter, paper-hanger and laundress, and was and is dependent upon her labor for support. In order to be cured of her injuries she also necessarily employed medical aid, and procured medical applications at considerable expense to her. That in consequence of the injuries the plaintiff received on the night in question, she suffered damages, for which the sum of three hundred dollars would be a reasonable compensation.

Second. As conclusions of law, I find that the common

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council of the city of Lockport has, under its charter, discretionary powers to direct, by ordinance, the crosswalks within the city to be repaired, and to cause an assessment of the expense of making such repairs, to be made on the property deemed to be benefited thereby, and not otherwise.

That the failure of the common council of the city of Lockport in the exercise of its discretionary powers to direct the repairs of the crosswalk in question, to be made so as to remedy its dangerous condition, does not render the city liable to the plaintiff for the damages which she has sustained in consequence of such injuries as she received by reason of the dangerous condition of the crosswalk.

That the plaintiff's complaint be dismissed, and the defendant have judgment accordingly, with costs.

Dated November 7th, 1870, A. W. BRAZEE, referee.

S. W. LOCKWOOD, *for appellant*.

I. The defendant is a municipal corporation, incorporated under chap. 365, Laws of 1865. A municipal corporation is bound to keep its streets, sidewalks and crosswalks in a safe condition for public use, and free from dangerous defects, which vigilance and care can detect and remove. A person may walk or drive in the darkness of the night, relying upon the belief that the corporation has performed its duty, and that the streets or walks are in a safe condition. The person walks by faith, justified by law, and if his faith is unfounded and he suffers an injury, the party in fault must respond in damages (*Davenport agt. Ruckman and The Mayor of New York*, 37 N. Y., 568; *Furzee agt. New York City*, 3 Hill, 612; *Storrs agt. City of Utica*, 17 N. Y., 104; *Conrad agt. The Village of Ithica*, 16 N. Y., 158; *Hutson agt. Mayor, &c., New York*, 9 N. Y., 163; *Hickock agt. Village of Plattsburgh*, 16 N. Y., 161; *Weet agt. The Trustees of the Village of Brockport* (opinion by Jus-

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tice Selden), 16 N. Y., 161 ; *Clark agt. The City of Lockport*, 49 Barb., 580 ; *Wallace agt. The Mayor, &c., New York*, 2 Hilt., 440 ; *Rochester Lead Co. agt. City of Rochester*, 3 Comst., 463.

By ch. 824, *Laws of 1867, Title 5, § 1 (as amended)*, "The common council shall be commissioners of highways for said city. They may regulate, repair, amend, alter and clean the streets, alleys, highways, bridges, side and crosswalks, drains, sewers, wharves, piers, docks, canals and slips in said city, and prevent the incumbering of the same in any manner, and protect the same from encroachments and injury. They may direct and regulate the planting, rearing and preserving of ornamental trees in the streets and parks of said city. But nothing herein contained shall prevent the improving of highways by local assessment."

The referee, in his findings as conclusions of law, seems to have overlooked the express powers granted to the common council, as commissioners of highways for said city, to repair the crosswalk in question according to the above section, and does not make any distinction on that account, which has been recognized by well settled authorities, heretofore cited (*see Clark agt. The City of Lockport*, 48 Barb., 580, and cases there cited).

The defendant is provided with a superintendent of streets (*chap. 365, Laws of 1865, title 4, § 12*).

The defendant has power to direct the making, curbing, repairing streets, sidewalks and crosswalks (*Laws of 1865, chap. 365, title 3, § 8, sub. 17, 19, 22, 28*).

Where a municipal corporation is empowered by its charter to keep its streets and walks in repair, it is bound to do so ; although the language is that of permission and not of command, its nature is plainly imperative (*Hutson agt. Mayor, &c., of N. Y.*, 9 N. Y., 163, 168, 169 ; *Furzee agt. N. Y. City*, 3 Hill, 612 ; *Adsit and others agt. Brady*, 4 Hill, 630 ; 1st Denio, 601).

The defendant is expressly empowered to make, or order

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and direct the making of, general or local improvements in the streets, lanes or alleys of said city (see *charter of defendant*, § 1, sub. 8, title 3, *Laws of 1865*).

The crosswalk in question was in the street or highway and part and parcel thereof; it was constructed across Spring street.

If the crosswalk in question is to be considered, in effect, a sidewalk, then it is a part of the highway (see *Wallace agt. The Mayor, &c., of New York*, 2 *Hilt.*, 440; *Davenport agt. Ruckman*, 37 *N. Y.*, 573).

Although the corporation may, by ordinance, impose the duty of repairing sidewalks or crosswalks upon the adjoining owners, this does not relieve the corporation from the liability (*Wallace agt. Mayor, &c., of N. Y.*, 2 *Hilt.*, 450—451).

The defendant is provided with a highway fund of \$2,500 a year to defray incidental expenses in repairing the highways (*Laws of 1869, chap. 835, § 1, of title 7 (as amended), page 2007*).

Section 18, title 5 of said charter, Laws of 1867: "The moneys collected for poll tax shall be used for highway purposes, and the commissioner of streets shall be an overseer of highways," &c.

The crosswalk in question extended over a deep gutter or ditch. It is submitted that it may properly come under additional § 21, to title 5, *Laws of 1869, chap. 835*, as follows: "The common council may construct, repair and maintain bridges, culverts and reservoirs, at the expense of the city," &c.

If the defendant had a discretionary power to build the crosswalk in question, or to have compelled the adjoining owners to build, yet having acted under the power granted, they were bound to see that it was kept in a safe condition of repair; though the language of the statute may be permissive or discretionary, yet it is plainly imperative (*Hutson agt. Mayor of N. Y.*, 9 *N. Y.*, 167, 168, 169).

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II. The referee, in deciding the case in question, has, undoubtedly, based his conclusions of law upon the theory advanced in the cases of *Hart agt. The City of Brooklyn* (36 Barb., 226); *Cole agt. The Village of Medina* (27 Barb., 218); *Peck agt. The Village of Batavia* (32 Barb., 634). I think it will be conceded that Judge MARVIN, of the 8th judicial district, who gave his opinion in the two cases last mentioned, has decided the case of *Clark agt. The City of Lockport* (49 Barb., 580), adverse to his theory in those cases. He yields to the principle advanced in the confirmation of the Plattsburgh case by the court of appeals.

The case of *Hart agt. The City of Brooklyn* (36 Barb., 226) is not a parallel case with the one in question. The powers granted to the common council of the city of Brooklyn in relation to the side or crosswalks, is extremely limited (*Laws of 1834, chap. 92, § 26, sub. 16 and 20*). The common council is nowhere made commissioners of highways for said city. The main powers granted in relation to side or crosswalks, is as follows: "To direct and regulate the flagging of sidewalks, or laying the same with brick, to prevent encumbrances on the same, and to compel the keeping of the same cleared and free from snow, ice or dirt, and to direct the sweeping and cleaning of streets by the persons owning or occupying premises fronting thereon."

III. The referee has decided that the defendant is not liable to the plaintiff for the injuries she has sustained, upon the theory that the defendant, under its charter, has discretionary powers to direct, by ordinance, the crosswalks within the city to be repaired. If such discretionary powers be a release of the defendant's liability, then the gross abuse of such discretionary powers is equally without a remedy for the person who may suffer injuries by the defendant's neglect to repair.

A dangerous defect in a sidewalk or crosswalk may, according to this theory, exist for years, and be especially notorious to the observation of the common council, but *that*

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discretionary power would be the shield against the damages resulting through such gross neglect.

By the acceptance of the privileges and franchises granted in the charter of the defendant, and the ample means provided for the agents and servants of the defendant to keep in repair the crosswalk in question, parties have the right to expect that while they are pursuing their avocations, the officers of the defendant have performed their duty. And if a person be maimed for life, or receive a severe injury, like the plaintiff in this case, through the neglect of such officers to perform their duty, the defendant, according to the authorities heretofore cited, should respond in damages. Though the plaintiff be poor, yet with a positive conviction that the referee who has decided against her in this case, is in error in his conclusions of law, she therefore resorts to this appeal, relying upon the belief that the law, based upon more solid and equitable principles will afford compensation to her for the injuries received.

JAMES F. FITTS, *for respondent.*

I. These findings of fact at once place this case outside of that numerous class, in which it has been held that a municipal corporation is liable to private damages resulting from the carelessness, unskillfulness, or negligence of such corporation or its agents in the original construction or repairs of public works. In other words, that when the corporation undertakes to exercise its powers, it must do so with due care and skill. (See *Conrad agt. The Trustees of Ithaca*, 16 N. Y., 158; *Rochester White Lead Company agt. City of Rochester*, 3 Comst. 463; *Lloyd agt. Mayor, &c., of New York*, 1 Seld., 369).

In the case at bar, the defendant did not repair, nor undertake to repair said crosswalk. This action is brought upon the theory that defendant is legally bound to make such repair. But,

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II. The city of Lockport has by law *discretionary, judicial* powers, relative to the making and repair of sidewalks and crosswalks within its corporate limits. Its failure in any case to repair, is simply a legitimate exercise of such power, and it can incur no liability for private damages therefor. (See Chap. 824, sec. 1, *Laws of 1867*, Chap. 542 *Laws of 1866*, "*Of Local Improvements*," pages, 1162, 1163, 1164, Secs. 1, 3, and 5).

Other acts relating to the city of Lockport are (Chap. 365, *Laws of 1865*; Chap. 809, *Laws of 1868*.)

The provisions referred to are, briefly, that the common council, of said city, *may* repair crosswalks; that any such repair (the same being a local improvement) *shall be* equally assessed upon the property benefited; and that, the same being one of those local improvements that can be made by the persons interested, they must have thirty days notice to make the same, when, the same not being made, the work may be let, and the expense shall be a lien on the property assessed. It cannot be assessed upon all the property in the city, nor paid out of any general or other fund, nor can it be made by the city in the first instance. The referee's conclusions of law, are based upon these statutes, and decisions hereinafter referred to.

The crosswalk in question was a local improvement. The referee finds that it was built by the parties deemed benefited thereby. It could only be repaired in the same manner.

The following cases are relied upon by respondent as conclusive against its liability in this case. (*Cole agt. Trustees, of Medina*, 27 Barb., 218; *Peck agt. The Village of Batavia*, 32 Barb., 634; *Hart et. al. agt. The City of Brooklyn*, 36 Barb., 226).

And the law, as settled by these cases, has been fully approved by the court of appeals. (See *Mills et. al. agt. City of Brooklyn*, 32 N. Y., 496, 497, 498), in which the court adopts this doctrine of discretionary or judicial

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powers, and cites the opinion in *Cole* agt. *Medina*, (*supra*), with approval. See also opinion of BEARDSLEY, J., in *Wilson* agt. *The Mayor, &c., of N. Y.*, (1 *Denio*, 599).

III. It may be contended by appellant that the court of appeals has settled the principle that where the legislative officers of a municipal corporation are made by law commissioners of highways of their municipality, the liability for damages resulting from non-repair of *streets* is positive. See case of *Detroit* agt. *Blakeby*, (*Am. Law Register for November*, 1870), in which all the New York cases are collected and reviewed, and a contrary conclusion reached.

The cases are few and unsatisfactory, however, which hold municipalities to such liability for *non-repair*. And in the general term cases cited, the distinction is carefully drawn between streets and side or crosswalks. The duties of municipal officers, as commissioners of highways, do not relate to walks. The case of *Davenport* agt. *Ruckman and Mayor, &c., of New York*, (37 *N. Y.*, 568), may be cited by appellant as holding municipal corporations liable for non-repair of walks.

That case relates to the city of New York alone, where, for obvious reasons, the corporation is held to much more strict duty in this respect than other municipalities. See opinion in this case in the court below, (Superior Court, City N. Y.) (16 *Abb.*, 341), in which the difference between the municipal powers of New York, and those of Brooklyn, Medina and other places, where the provisions of the charter are similar to those of respondent, is carefully pointed out; where New York, is held liable because the powers of its corporation in this respect are ample, while in the other places they are restricted; and which cites the cases of (*Cole* agt. *Medina*, *Peck* agt. *Batavia*, and *Hart* agt. *Brooklyn*), with entire approval.

Therefore, the indorsement by the court of appeals of the doctrine of non-liability of these corporations, for failure to exercise powers which are discretionary or judicial, as

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made in *Mills* agt. *Brooklyn*, (*supra*), is not in the least disputed by the opinion or judgment in *Davenport* agt. *Ruckman*, and must be regarded as an authoritative application of the principle claimed to such corporations as respondent.

IV. A class of cases may be cited by appellant, holding that the grant to a municipal corporation of a power, which may be for the benefit of the public, implies a duty which may be insisted on.

But these cases carefully except those corporations "where the powers have been so limited to accomplish the object that the courts have considered their duty resting in too much doubt to render them liable, or that the duty was not imposed at all, by an omission to give them the means necessary to accomplish the object." (See opinion of MASON, J., in *Hutson* agt. *The Mayor, &c., of New York*, (5 *Seld.*, 170).

The judgment entered on the report of the referee should, therefore, be affirmed, with costs.

By the court, MULLIN, P. J.—It is found by the referee, that the defendant by its officers, in August, 1867, caused to be constructed across Spring street, in the city of Lockport a crosswalk consisting of two planks, the interior edges of which were so crooked as to leave an opening between them across the gutter, four inches wide and several feet in length. This opening was filled when the walk was made, with a piece of plank which was kept in its place by spikes, so that when the walk was completed it was safe, and in good repair.

In about a year after the completion of the walk, the planks of which it was constructed, became loosened, and the piece of plank which had been put between them to fill the opening, was in some way removed, and a hole left between the planks, of from four to six inches in width. This opening rendered the walk dangerous to persons passing over it, and especially so in the night.

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On the 30th June, 1870, in the night time, and during a severe thunder storm, and while it was very dark, except when lighted by the flashes of lightning, the plaintiff attempted to pass along this walk, fell through and sustained injury to the extent of \$300.

The walk had been in a dangerous condition for about a year, and that fact was known to the common council.

The referee held as a conclusion of law, that as it was in the discretion of the common council to direct the repairs of crosswalks in said city, it is not liable, because of the neglect or refusal to exercise such discretion, and he therefore, ordered judgment, dismissing plaintiff's complaint.

If this conclusion of the referee is a correct exposition of the law relating to the powers and duties of the common council of Lockport, the inhabitants of that city are of all men, the most miserable.

The proposition comes to this, the common council may make or cause to be made, streets, sidewalks, crosswalks, culverts, sewers and drains, and it is, thereafter, relieved from all liability in respect thereto, notwithstanding the streets and walks may be washed away by floods, the sewers, &c., fall in by reason of defective construction, or filled for want of proper care, and the inhabitants whose business calls them into the streets at night, and without fault, fall into the opening in the streets, or sewers, and are thereby injured, must bear the loss, because the common council have not seen fit to exercise the discretion vested in them by the charter, and cause the defects in the streets to be repaired.

It rests entirely in the discretion of the common council, when a new street is to be put in condition for public use, when a new side or crosswalk is to be laid, or street paved, sewered or drained, and the manner in which such work is to be done.

It is also a matter resting in discretion whether any and if any, what part of the work, or expense of making a

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local improvement shall be done or borne by the city, and how much by the persons benefited. (*Section 10 of Chap. 835, of the Laws of 1869*).

This is, I apprehend, the extent of their discretion.

The first, and one of the most important questions arising on this appeal is, whether the common council has the power to make, or repair cross and sidewalks in said city.

That it has the power to make and repair streets is not questioned.

A cross walk lies in the street, and is a part of it; when it is out of repair, the street is out of repair, and the person or corporation bound to repair the street is bound to repair the crosswalk, or which is the same thing, the part of the street on which it lies must be made so as that teams and persons may pass over it safely.

Where there is a sidewalk on either side of the street, the crosswalk lies between them and within the space set apart for teams, and is intended to furnish the foot passengers a convenient passage over the gutters on each side of the street.

In *Graves agt. Otis*, (2 *Hill*), it was held that the commissioners of highways had control of the whole space set apart as a street, and it must follow that it is their duty to keep such space in repair. This does not mean that they are required to construct side or crosswalks, but if the latter is constructed it is the duty of the commissioners to keep in repair that part of the street in which it lies.

But the power and the duty of the corporation of Lockport, to make and repair crosswalks are not left to be inferred. They are expressly given and imposed by the charter.

By *sub. 17 of § 8 of title 3*, the common council has power to direct the making, curbing, repairing, macadamising, paving graveling and flagging of any of the streets, alleys, sidewalks and crosswalks in said city.

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The statute does not say in terms to whom the discretion shall be given, whether to the street superintendent or to the persons locally benefited by the work.

The discretion is to be given to the superintendent in three cases :

1st. When it is the duty of the common council to do the work, (1 *charter*, § 12, *title* 4).

2d. When the work to be done is a local improvement, and the expense to be assessed upon and paid by the persons benefited.

3d. When the work is such as may be done by individuals, and they omit to do it within the time allowed for that purpose, (*charter*, § 3, *title* 6).

Individuals are permitted to do such part of the work in making such local improvements as may be assessed to them by the assessors, when the work is of such description as it may be done by those interested severally, (*same* §).

In this case the common council, although cognizant of the defects in the walk, gave no direction to any person or officer to repair the walk, and thus a duty clearly imposed has been as clearly neglected.

Whether the city is liable to the plaintiff by reason of such omission is the question to be hereafter considered.

The proposition is repugnant to every man's sense of right and justice, that the common council of Lockport, or of any other city, can construct a crosswalk in a public street, knowingly suffer it to be out of repair until a traveller breaks a limb, or suffers some other great bodily injury by reason of defects in it, and nevertheless be exempt from all liability for such gross culpable negligence. If the statute imposes the duty to build, and yet deprives them of the power, or what is the same thing, deprives them of the means to repair, the legislature and not the corporation is liable. But, when there is no such want of means or power, if the crosswalk is built it must be kept in repair. If there

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is no power to repair a walk, it ought not to be built, and those building under such circumstances are deserving of the severest condemnation.

But, if I am wrong in supposing the duty of repairing crosswalks is, in terms, imposed upon the common council by the charter, and it has no discretion whether it will repair a walk that has become dangerous to travelers, it has, in addition to the powers mentioned above, that of commissioners of highways of towns (§ 1, *title 5 of charter*), and under that power, it is the imperative duty of the common council to cause crosswalks, &c., to be repaired, and if it is not done, the city is liable for whatever damages individuals may sustain by reason of such omission.

The section referred to is in the following words: "The common council shall be commissioners of highways of said city, they may regulate, repair, amend, alter and clean the streets, alleys, highwas and bridges, cross and side walks, drains, sewers, wharves, docks, piers, canals, and slips in said city."

But nothing herein contained shall prevent the improving of highways by local assessment.

More extensive powers over the streets, cross and side-walks could not be well conferred, and the only limitation is that notwithstanding the power is thus given to the corporation, the expense of improving the streets may be imposed upon the persons benefited.

The duty of making the improvement rests with the corporation, but the expense instead of being a charge upon the city treasury, may be imposed upon those deriving benefit from the improvement.

The language of the charter is permissive, "The common council may regulate," &c., and therefore it is insisted, that it may omit, in its discretion, to perform the duty, and not be liable for damages resulting from such omission. Such, however, is not the law. The true rule is laid down in *Hutson agt. Mayor* (5 *Seld.*, 163). It is there said that when

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a public body is clothed with power to do an act, which the public interest requires to be done, and the means of performance are placed at its disposal, the execution of the power may be insisted on as a duty, notwithstanding the statute conferring it is only permissive (*The Mayor, &c.*, agt. *Hurze*, 3 *Hill.*, 612).

It was for a long time considered by the profession as doubtful, whether the commissioners of highways of towns were liable for injuries resulting from their neglect to keep the roads and bridges in their towns in repair; it has, however, been finally settled, that they are not liable, unless they have in their hands funds applicable to such repairs (*Garlinghouse* agt. *Jacobs*, 29 *N. Y.*, 297).

But, when the common council of a city, or the trustees of a village, are made commissioners of highways, the duty to repair the streets becomes imperative, unless they not only have not funds applicable to that use, but have not by the charter the power to raise them (*West* agt. *The Village of Brockport*, 16 *N. Y.*, 159; note to *Conrad* agt. *Trustees of Ithaca*).

In *Hickock* agt. *The Trustees of Plattsburgh* (15 *Barb.*, 427), the corporation was sued for damages sustained by the plaintiff in falling, in the night, into a trench dug in one of the streets of the village, which was left without lights or guards, notwithstanding the existence of the trench was known to one of the trustees. The trustees were, by the charter, made commissioners of highways, and it was shown that there remained unapplied 800 out of 1,000 days highway labor assessed on the inhabitants. The plaintiff was nonsuited on the ground, that the trustees, as commissioners of highways, were independent officers, and the corporation was not liable for their neglect of duty. This judgment was reversed by the court of appeals, as appeared by the statement of *DENIO, J.*, in *Conrad* agt. *Trustees of Ithaca*, on the ground that the corporation was liable for the neglect of duty of the trustees; that they were not inde-

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pendent officers, but stood to the corporation in the relation of a servant to his master, liable to the same extent as a master would be for the misconduct of a servant.

In *Conrad agt. The Trustees of Ithaca*, the court of appeals adopted the opinion of SELDEN, J., in *West agt. The Village of Brockport*, as a correct, exposition of the law applicable to the liability of corporations and individuals upon whom the sovereign power has conferred by grant or charter, the obligation to perform the duties for the benefit of the public.

The distinction between the liability of commissioners of highways of towns and of corporations, whose trustees or common council are declared by charter to be commissioners of highways, is thus stated by SELDEN, J., "whenever an individual or corporation for a consideration received from the sovereign power, has become bound by covenant or agreement, either express or implied, to do certain things, such individual or corporation is liable in case of neglect to perform such covenant, not only to indictment, but to private action at the suit of the person injured by such neglect. In all such cases, the contract made with the government is deemed to inure to the benefit of every individual interested in its performance."

Again, he says: "The liability of municipal corporations for the acts of trustees made by the charter, commissioners of highways, is not that of commissioners depending on whether or not they have funds applicable to the use, but is an absolute liability resulting from a contract with the sovereign power, implied from the acceptance of the charter that they would perform the duties thereby imposed upon them." DENIO, J., says: in *Conrad agt. The Trustees of Ithaca*, "that it was held in the case of *Hickock agt. The Trustees of Plattsburgh* to be a corporate duty to keep the streets in good condition."

It seems to me, that the principles thus settled by the court of last resort, establish the liability of the city of

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Lockport, for the neglect of its common council to keep the crosswalk in question in repair, provided the common council had funds which it could appropriate to that use, or power to raise them.

The next, and only remaining inquiry is, whether the common council was furnished with funds that it could apply to the repair of the crosswalk in question. Section title 5 of charter, provides, that \$2,500 of the monies raised by the common council, and no more except as thereafter provided, may be used to defray the expenses of repairing and keeping in order the highways, sewers, bridges and public grounds of the city. By § 18 and 19, each male inhabitant above the age of twenty-one years, not assessed for real or personal property in said city, and not paupers or lunatics, are obliged to pay one days' poll tax which might be commuted for one dollar, to be applied in addition to the sum named in the proceeding section, to the repair of the highways.

How much arises from the poll tax we do not know, but it must be assumed that proceeds sufficient to make all ordinary repairs of streets and crosswalks are furnished.

Under these circumstances, it was incumbent on the defendant to show, if it could be shown, that there were not funds applicable to the repairs of the crosswalk in question. They have the means of showing the exact condition of the highway fund at any and all times, while the citizen cannot be presumed to have any knowledge on the subject.

The commissioners of highways of towns owe no duty to individuals to keep the highways in repair, unless furnished with funds, to subject them to liability. That fact must be alleged and proved by the party seeking to charge them. But when the trustees of towns, or the aldermen of cities, are made commissioners, they are liable for neglect of duty, unless the charter withholds from them the power to raise funds, to keep streets, &c., in repair.

If any means are furnished to them, which they are au-

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thorized to apply to repairs, and if the corporation desires to exempt itself from liability by reason of the want of funds, it must prove the fact, and unless proved it is liable.

If the repair of crosswalks is not a charge on the city treasury, but is to be deemed to be a local improvement, and as such the expense is to be borne by those benefited, the city is still liable for damages resulting from neglect to keep them in repair. Its power to direct the repair does not depend upon the consent of the people, or any portion of them. The common council have but to make the order, and the work must be done, and the property benefited must pay the expense, or the persons liable to be assessed must do the work themselves.

There is, therefore, in any contingency, ample means accessible to the common council with which to do the work, and, upon every principle, the city should be liable if it is not done.

The judgment of the referee is reversed, and a new trial granted, costs to abide the event.

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COURT OF APPEALS.

STEPHEN K. WILLIAMS, respondent, agt. SUSAN P. MANNING, administratrix, &c., of JOHN MORRISON, deceased, appellant.

After dissolution, the letters of a former partner, not a party to the suit, are not competent evidence against the other partner, who is sued alone, as admissions, or as tending to prove general facts in the case.

As to such facts the partner not sued is a competent witness, and must be called.

The plaintiff having averred his insolvency as a reason for not suing him, cannot claim that he is a party in interest, and therefore, represents the solvent party.

Where an attorney collects a debt of less than \$200 for absent clients, and so manages the business as to involve his clients in six suits, with expenses of several thousand dollars, such facts are proper to be considered in fixing the amount of compensation to be recovered of the clients by the attorney.

Argued January, 1870, and decided June, 1870.

THIS is an appeal from a judgment rendered in favor of the plaintiff on a report of a referee.

The action was brought by Williams, an attorney and counsellor-at-law, to recover for services rendered to John Morrison and Alexander Morrison, and to obtain restitution of damages and expenses to which, as he claims, he had been subjected in their behalf, and against which, as he claims, they had indemnified him.

Williams collected about \$175, on execution against one Sutherland, and paid over to Morrison and Son. The property was claimed, under two chattel mortgages, and six suits brought.

The whole amount of principal reported by referee for services, besides interest, was as follows:

In Ford & Rockwood agt. Williams, \$1,331 95; Same agt. Kenyon, \$106 29; Same agt. Morrisons, \$106 15; in

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Freeman, *et al.*, agt. Williams, \$943 83; Same agt. Kenyon, \$109 97; Same agt. Morrisons, \$110 53. Total, \$2,708 72.

The referee also allowed interest on that sum from February 23, 1863, to date of report, February 14, 1868,—\$943 15.

The referee also allowed the plaintiff the sum of \$836 59, being the judgment recovered against him by Ford & Rockwood, and interest thereon from June, 1862,—\$331 98.

The whole sum reported against the defendant was \$4,819 44,—on which, with interest and costs, amounting to \$5,149 47, judgment was entered, June 30, 1868.

The case against Williams, went twice to the court of appeals, and is reported, (13 *N. Y.*, 577; 24 *N. Y.*, 359).

Ford & Rockwood finally succeeded in all three suits brought by them. Freeman failed in the three suits brought by him, but no costs have as yet been collected out of his estate by Williams.

John & Alexander Morrison dissolved partnership in December, 1848, shortly after the sale upon the original execution.

They authorized Williams as their agent to indemnify the sheriff, and managed the defense of the suits up to May, 1854. The letters up to that date to Williams were written in the name of John Morrison & Son, the old firm name. After that date, the letters were all written by Alexander Morrison in his individual name. He removed to Albany, in about 1855, and became insolvent in 1864.

The second trial in May, 1858, resulted in a judgment againsts Williams, and the defendant claims, that after that date, John Morrison never authorized the last appeal, or continued the litigation, but claims that Alexander proceeded on his own account.

John Morrison died in 1866, and this suit was begun June 25, 1867, against the administratrix, and Alexander was not made a party, because he was insolvent and never had been sued as survivor.

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The defendant pleaded the statute of limitations, and claimed the cause accrued in May, 1858, when the judgment went against Williams on the second trial.

To show authority to bring the appeal, Williams gave in evidence, various letters written by Alexander in his own name. The latter was not called as a witness by either party, and the defendant's counsel objected to the letters of Alexander, and asked the referee to rule that his letters or admissions were not competent evidence against the defendant, but the referee ruled otherwise.

E. F. BULLARD, *for defendant and appellant.*

T. R. STRONG, *for plaintiff and respondent.*

GROVER, J.—Having come to the conclusion, that there must be a new trial for the reason that the referee erroneously received in evidence the letters of Alexander Morrison, as proof of the facts therein stated against the defendant, I shall not examine the other questions discussed by counsel, as they may be somewhat varied upon another trial, Alexander Morrison, although, a former partner of John Morrison, the defendant's intestate, against which firm the plaintiff claimed the indebtedness sought to be recovered in the action, was not a party. The action was brought against the defendant as the representative of John Morrison, deceased, to recover the debt from his estate, upon the ground that Alexander Morrison, the surviving partner was wholly insolvent. It is true, that the referee has found in effect, that none of the letters received in evidence were written by Alexander, after the plaintiff knew of the dissolution of the partnership. But this does not affect the question under consideration. That is not whether John Morrison and his representatives are bound by a contract made by A. Morrison, on behalf of the firm, but whether the admissions of Alexander either oral or written, are competent evidence against John Morrison or his rep-

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representatives in an action against him, or them, brought upon a claim against the firm. The elementary rule is, that the admissions of parties to the record, or of those represented by such parties only, are admissible.

The declarations of those having an interest in the subject matter litigated are equally incompetent with those who are disinterested. The party against whom such declarations are offered has the right to insist that the person making them, although interested, shall be introduced as a witness to prove the facts, and that he shall have the right of cross-examination, otherwise the most important rights might be lost without any chance of redress. The fact that Alexander was the former partner of John, and that his interest, if any, originated therefrom, does not affect the rule, or the reasons upon which it is founded. Alexander was a competent witness, and would have been prior to the statute obviating objections to his competency founded upon his interest. Under this state of facts, his declarations, either oral or written, were but mere hearsay, and incompetent. This precise objection was taken by the counsel for the appellant, and overruled by the referee. Under this ruling, a large number of letters were received, to some of which the objection was not renewed.

This was unnecessary after the referee had, by his ruling, settled the question that the letters of Alexander were competent evidence. Portions of the letter, showing an employment of the plaintiff by the firm, were competent. Other portions, stating facts showing, or tending to show, the extent of the plaintiff's services, the satisfaction of the firm therewith, or any other fact affecting the issue, except the making of contracts binding upon the firm were incompetent; and when the letters were offered in evidence containing incompetent matter, to which the proper objection was taken, it was error to overrule it.

There are exceptions to the rule excluding the declarations

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of those not parties, and those represented by parties, but the present case does not come within any of them.

For such exceptions see *Vrooman agt. King* (36 N. Y., 477); *Brown agt. Mailer*, 12 N. Y., 118; *Stark agt. Burrell* (6 Hill., 405); *Paige agt. Cagwin* (7 Hill, 361). The incompetent evidence may not have affected the result, but it is impossible for the court to determine that it did not.

Upon this ground the judgment must be reversed, and a new trial ordered. While this court cannot entertain the question, whether the amount of the recovery was not excessive, I cannot abstain from the remark that upon a re-trial I should expect that the amount of the debt placed by the firm in the hands of the plaintiff, for collection, the amount collected, and paid over thereon; the fact that the firm resided in a distant part of the state, and of necessity must have relied upon the advice and information of the plaintiff, in determining the course to be pursued; the very serious litigation in which they became involved, and the disastrous result thereof, would be thoroughly consistent, in determining the amount that the plaintiff was reasonably entitled to recover for his services as attorney and counsel, if entitled to recover in this action. Therefore, I apprehend from the testimony in the case in connection with the amount of the recovery, that some of these considerations must have been overlooked by the learned referee in considering the case.

Judgment reversed, and new trial granted.

SUPREME COURT.

THE PEOPLE of the state of New York, *ex rel.*, BENJAMIN T. BABBITT *agt.* THE BOARD OF COMMISSIONERS OF TAXES AND ASSESSMENTS for the city and county of New York.

In determining the amount of personal property of an individual, by assessors or commissioners of taxes, for the purpose of taxation, *stocks and bonds of the United States* are to form no part of the estimate. They cannot be excluded or deducted from the amount of his assets, liable to taxation, for it is error to include them in such assets.

At a special term of the supreme court of the state of New York, held at the city hall, in the city of New York, on the 29th day of June, 1870.

Present, Hon. ALBERT CARDOZO, J.

(*Title of cause*). ORDER.—On reading and filing the petition of Benjamin T. Babbitt, the relator above named, and on motion of A. R. Lawrence, Jr., of counsel for the said relator.

It is ordered that a writ of *certiorari* issue out of this court, directed to the commissioners of taxes and assessments for the city and county of New York, commanding them that they do certify and return their proceedings in the matter of the assessment or valuation of the personal property or estate of the said relator, liable to taxation, in the city and county of New York, for the year 1870, with the assessment roll on which the name of said relator and such assessments are entered, and under what law, or by virtue of what power the assessment is made, and all things, papers and documents appertaining thereto, unto our supreme court, before one of the justices thereof, at a special term at

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chambers, to be held at the court house, in the city of New York, on the first Monday of July, 1870, at 12 o'clock M.

A copy.

CHARLES E. LOEW.

Certiorari.—The people of the state of New York.

To the board of commissioners of taxes and assessments for the city and county of New York.

We, being willing, for certain causes to be certified, of the proceedings, decision and action had by and before you, in the matter of the assessment for taxation of the personal property or estate of Benjamin T. Babbitt, of the city of New York, by you lately made, do command you that all and singular the said assessment made by you for the year 1870, and all and singular the documents, papers and rolls relating thereto, and your decision and action therein, with all things touching or concerning the said assessment, as fully and entirely as the same remain with you, you send to our supreme court of judicature, at a special term thereof, to be held at the court house, in the city of New York, on the first Monday of July next, together with this writ, to the end that your decision and action in the matter of the said assessment, may be reviewed and corrected on the merits by our said court, and that we may further cause to be done thereupon what of right should be fit to be done.

Witness, Hon. ALBERT CARDOZO, one of the justices of our court, at the court house, in the city of New York, the 29th day of June, eighteen hundred and seventy.

By the court.

CHAS. E. LOEW,

Clerk.

Return.—To the supreme court of the state of New York.

We, the undersigned commissioners of taxes and assessments for the city and county of New York, by virtue of and in obedience to a certain writ of *certiorari* to us directed and hereto annexed, do certify and return,

That we did, as by law required, on or about the 10th day

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of January, 1870, assess the personal estate of Benjamin T. Babbitt, mentioned in the said writ of *certiorari*, at the sum of two hundred and fifty thousand dollars, and that such assessed valuation was duly entered in the books provided for that purpose, and kept in the office of the said commissioners, called The Annual Record of the Assessed Valuation of Real and Personal Estate.

That notice of such assessment was duly given to said Benjamin T. Babbitt.

That thereupon said Babbitt, on or about the 29th day of April, 1870, did address to us, the said commissioners, a written statement or communication, verified by his oath, a true copy whereof is hereunto annexed as a part of this return, marked schedule "A," and that said Babbitt, on the 29th day of April, 1870, did attend before us, the said commissioners, at our office, in the city of New York, and offered to be examined by us under oath, pursuant to the statute in such case made and provided, touching his personal estate assets and property, and as to his debts and liabilities.

That we, the said commissioners, did thereupon waive such examination, and accepted and retained the said statement of said Babbitt (schedule "A") as a true statement of his personal estate, assets and property, and of his debts and liabilities.

That the said Babbitt did then and there request and demand of us, the said commissioners, that we should strike out the said assessment of two hundred and fifty thousand dollars from the said books of annual record of assessed valuation, and upon the assessment roll of the year 1870; and also did request and demand of us, the said commissioners, that we should not assess any amount whatever against him, the said Babbitt, for the reasons set forth in the statement hereinbefore mentioned as schedule "A," hereto annexed.

That thereupon we, the said commissioners, did examine into the said statement made by the said Babbitt, and did

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consider his said request and demand, and we determined and decided to reduce the said assessment of the personal estate of said Rabbitt to the sum of two hundred thousand dollars, and that said assessment was thereupon made and fixed at said last mentioned sum, and duly entered on the assessment rolls of the year 1870, and that such assessment stands in the said annual record of the assessed valuation of real and personal estate as an assessment for that amount against the said Babbitt upon his personal estate.

That said decision thereon was declared and such reduction made within thirty days after the said application was made to us, as aforesaid, and prior to the 30th day of May, 1870, and that written notice of said decision was duly given by us to the said Babbitt, on or about the 26th day of May, 1870.

That a copy of said notice is hereto annexed as a part of this return, marked schedule "B."

That the said assessment was not made upon the public stock or bonds of the United States, but upon personal estate of the said Babbitt not exempted from said assessment by any law of the United States, or of the state of New York; and that our action in making the same was under and in pursuance of the several laws of the state of New York relating to the assessment and collection of taxes in the city and county of New York.

That said assessment was made in accordance with instructions given to us by the comptroller of the state of New York in pursuance of the statute in such case made and provided, which instructions, we, the said commissioners, are bound to follow.

That a copy of such instructions is hereto annexed as a part of this return, marked schedule "C."

All of which we, the said commissioners, do hereby certify and return, as by said writ of *certiorari*, we are commanded.

In testimony whereof, we have respectively to these pres

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ents subscribed our names and affixed our seals, at the city of New York, on the 28th day of July.

GEORGE H. ANDREWS, [L. s.]
THOMAS J. CREAMER, [L. s.]
W. H. KING, [L. s.]
NATHANIEL SANDS. [L. s.]

SCHEDULE "A."—*To the commissioners of taxes and assessments for the city and county of New York:*

GENTLEMEN, I am in receipt of your notice to me that my personal estate for 1870 is assessed at two hundred and fifty thousand dollars, exclusive of bank stock, and stating that the same, if erroneous, must be corrected on or about the 30th day of April next, or it will be confirmed at that amount, from which there will be no redress.

I hereby notify you that the said assessment is erroneous, and that I am not liable to be taxed upon any personal property.

I own bonds of the United States of America, of the par value of two hundred and fifty thousand dollars, being the bonds commonly known as the five-twenties, all of which were purchased by me during the years of 1865, 1866 and 1867, for permanent investment, and have ever since been owned and held by me as such, and that none of such bonds have been purchased since January 1st, 1868; my debts and liabilities exceed my assets in the business in which I am engaged, and any other personal property owned by me.

The following is a correct statement of my assets and liabilities on the first day of January, 1870, in the business in which I am engaged.

ASSETS.—Merchandise, machinery and fixtures in factory, \$115,503 45; horses, trucks and furniture, \$5,000; book accounts, \$129,145 13; bills receivable, \$15,409 09; cash, \$62,838 25; household furniture at residence, \$12,000; horses and carriages, private, \$6,000; total, \$345,895 92.

LIABILITIES.—Loans, borrowed money and accrued inter-

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est, \$351,418 59 ; book accounts, \$4,665 ; total, \$356,084 94.

And since that date my debts and liabilities have increased, and the excess of such debts and liabilities over the amount of my assets and personal property is now greater than it was on the first day of January, 1870.

I have no personal property other than the United States bonds before mentioned, and the property mentioned and referred to in the foregoing statement.

I therefore respectfully require that you should strike my name from the assessment rolls for the year 1870, as liable to be assessed in the sum of two hundred and fifty thousand dollars, or in any sum whatever for personal estate.

It is proper that I should state again, as I have before stated in person, that I am ready and willing to be examined under oath by you, or any of you in relation to my personal estate, and as to my liabilities to be taxed thereon.

I also verify this statement for the purpose of showing you that I make the application to have my name stricken from the assessment rolls in good faith. Yours respectfully,

B. T. BABBITT.

Dated New York, April 15th, 1870.

City and county of New York, ss: Benjamin T. Babbitt, being duly sworn, says that he has read the foregoing statement by him subscribed, and knows the contents thereof, and that the same is true of his own knowledge.

B. T. BABBITT.

Sworn to before me April 29th, 1870.

J. M. SCRIBNER, Jr., *Notary Public, New York City.*

SCHEDULE "B."—Department of the Commissioners of Taxes and Assessments, City Hall Park, Chambers street. New York, May 20th, 1870. Sir: Your affidavit of the 29th ult. represents that your property is of the value of: taxable, \$345,895 93 ; that your debts are \$350,089 49 ; that your United States bonds at par are \$250,000 ; difference, \$106,084 49 ; leaving liable to taxation, \$239,811 42.

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The commissioners have fixed upon \$200,000 as an equitable amount for your assessment upon personal property for 1870.

The deduction above named of your U. S. bonds from the amount of your indebtedness is in accordance with instructions issued by the state comptroller, which the commissioners are bound by law to follow. GEO. H. ANDREWS, W. H. KING, NATHANIEL SANDS, *Commissioners of Taxes and Assessments.* To Benjamin T. Babbitt.

SCHEDULE "C."—Extract from instructions to assessors from state comptroller. Albany, May 10th. " * * Assessors should, in ascertaining the value of the personal property taxable, and to be entered upon the assessment roll, deduct the debts owing by the taxpayer from the gross value of his personal property, including that exempt by the laws of the United States, and enter the balance in the assessment roll, not exceeding the value of that which is taxable by law. W. F. ALLEN, *comptroller.*"

At a special term of the Supreme court of the state of New York, held at the court house, in the city of New York, on the 28th day of July, 1870.

Present.—Hon. JOHN R. BRADY, J.

(*Title of cause*). ORDER.—On reading and filing the return of the board of commissioners of taxes and assessments to the writ of *certiorari* issued herein, and on the consent of the respective counsel for the said relator and respondents,

It is ordered that the hearing on said writ and return be had in the first instance at the general term of this court. A copy. CHARLES E. LOEW, *clerk.*

J. M. SCRIBNER, Jr., *attorney, and*

A. R. LAWRENCE, J.r, *counsel for relator.*

Facts. The petitioner is a resident of the city of New York, engaged in business at No. 89 Washington street.

On the 1st of January, 1870, his personal property and as-

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sets, other than certain bonds of the United States, amounted to the aggregate sum of \$345,895 97.

His debts on said day amounted to \$356,084 49.

Between January 1st, and April 29th, 1870, the liabilities and debts of the petitioner increased, and on the 29th day of April, the excess of such debts and liabilities over his assets and personal property was greater than on the 1st day of January, 1870.

He had, between the dates aforesaid, no other assets or personal property than those above mentioned, except the United States bonds hereinafter mentioned, nor were his debts and liabilities, at any period between January 1st and May 1st, 1870, ever less than \$356,084 49; *and his debts and liabilities were at all times between those respective dates greater than his assets*, excepting therefrom the United States bonds.

The relator was notified by the respondents that his personal estate had been assessed at the sum of \$250,000.

On the 29th day of April, 1870, the relator addressed to the respondents a written notice, verified by his oath, claiming that he was not liable to taxation in any amount for personal estate; requesting them to strike his name from the assessment rolls, and giving in detail his debts and liabilities, and the amount of his personal estate and assets.

He attended before the respondents on the same day, and offered to be examined under oath. This was declined, and the statement was left by him with the respondents.

By the statement above referred to, it appeared that the relator, at the time aforesaid, was the owner of bonds of the United States of the par value of \$250,000, commonly known as five-twenties, which had been purchased by him in the years 1865, 1866, and 1867, *for permanent investment, and have ever since been held and owned by him, and that none of the said bonds were purchased since January 1st, 1868.*

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This fact also appears from the petition as an independent allegation.

The petitioner insisted before the respondents, that as his debts and liabilities exceeded the amount of his personal property, save the bonds aforesaid, he was not liable to be assessed or taxed in any amount for personal estate, and that those bonds could not be taken into consideration *for the purpose of taxation*, either as a *part of his capital*, or for the *reduction of his debts and liabilities*.

He demanded that his name should be struck from the assessment roll.

The respondents declined to do this, but by a notice in writing informed the relator that they had reduced his assessment to \$200,000.

By this notice, which, although dated May 26th, was not served on the relator until June 14th, 1870, it appears that the respondents deducted from the relator's debts the par value of his United States bonds, and that they then deducted the balance thus obtained from his assets, and fixed upon the sum of \$200,000 as an *equitable* amount for the assessment of his personal property.

The relator thereupon brought a *certiorari*.

The return of the comptrollers is at pp. 12 to 17 of the case.

By the return it appears, that the respondents acted under the instructions given by the comptroller of the state, for which see.

I. The respondents erred in taking into consideration the bonds of the United State, of which the relator was the owner, for the purpose of determining the amount of personal estate for which the relator was liable to be assessed and taxed.

(a.) Stock of the United States is not subject to taxation under the laws of a state, and a state law for that purpose is unconstitutional, whether it imposes the tax on United States stock *eo nomine*, or includes it in the aggregate of the

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tax-payer's property, to be valued like the rest at its worth. (*Bank of Commerce, N. Y., 2 Black, 620*).

And it has also been held that a tax laid by a state on banks "on a *valuation equal to the amount of their capital stock* paid in, or secured to be paid in," is a tax on the *property* of the institution, and when that property consists of *stocks of the Federal Government*, the law laying the tax is void. (*Bank Tax Case, 2 Wallace, 200*).

(b.) It seems to the relator to be clear, that the respondents, in determining the amount of his personal property liable to taxation, have *included* the United States bonds of which he was owner in the aggregate of his property, "*and valued it, like the rest, at its worth.*" (*2 Black, 260*).

The effect of their action is the same as if the respondents had added the \$250,000 of bonds to the rest of the relator's assets, and then deducted the amount of his debts from the aggregate sum. In other words, the United States bonds of the relator have been included as an element in the amount to be taxed as the relator's personal estate.

And they have been made just as much the subject of taxation as if they had been added to the taxable personal property of the relator.

II. The Revised Statutes provide, that assessors "shall prepare an assessment roll, in which they shall set down, in four separate columns, and according to the best information in their power :

"1st. In the first column the names of all the taxable inhabitants of the town or ward, as the case may be. * * *

"4th. In the fourth column the full value of all the *taxable personal property* owned by such person, *after deducting the just debts owing by him.*" (*1 R. S., p, 363, sec. 9, Edmond's ed.*)

(a.) It is obvious that the respondents in this case have not only assessed the relator's bonds as a part of his personal estate, which was an illegal act on their part, under the decisions above referred to, but that they have also violated

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the provisions of the Revised Statutes prescribing the mode of arriving at the amount of personal estate, for which an individual is liable to be assessed.

The relator, we submit, was entitled to two exemptions :

1st. He was entitled to have his United States bonds laid entirely out of view, in ascertaining the amount of his personal estate, *because* they were not taxable by law for any purpose; and,

2d. He was entitled, under the law of this state to have his just debts deducted from his *taxable* personal property.

The United States bonds which he owned were not more under the jurisdiction of the respondents or their duputies, than if they had been owned by a third party.

The effect of the action of the respondents was to deprive the relator of his right to escape taxation upon his United States bonds, because they were applied by the respondents to the rednction of another item, to wit, his debts, which item he was entitled by the laws of the state to have deducted *in full* from the amount of his taxable personal property.

(b.) The effect also was to deprive the relator of the right to have his just debts deducted as provided by the Revised Statutes.

The respondents should, in the language of the Revised Statutes, have placed in the fourth column of the roll, the full value of all the *taxable* personal property owned by the relator, *after deducting the just debts owing by him.* (1 R. S., 363, sec. 9, *Edmond's ed*).

Instead of doing so, they have deducted from his debts \$250,000 which was exempted by law from taxation, and have, therefore, decreased his debts in that amount. The relator has not, therefore, been allowed the deduction on account of his debts to which the Revised Statutes entitle him.

III. The precise point presented in this case does not seem to have been passed upon by the courts of this state, but there is a decision in the case of *The People, ex rel., The Lockport City Bank agt. The Board of Education of Lockport,*

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(46 *Barb.*, 588), which may be cited as authority for the action of the respondents in this case, and which, therefore, demands some consideration here.

In that case, the relator was a bank organized under the general banking law of 1858, with a capital of \$104,000.

The defendants caused the relator to be assessed in the sum of \$102,400, being the whole amount of its capital stock paid in and secured to be paid in, and on all its surplus profits, &c.

It appeared, that the bank had \$203,500 of United States stocks or bonds, a portion of which was deposited with the bank department, and that the total value of all the other personal property of the bank did not, at the time the assessment was made, exceed, and had not since exceeded, the amount of its debts.

The relator brought a mandamus to have the assessment stricken from the roll, which was denied, but the court based its decision upon the ground that the provisions of the Revised Statutes requiring the assessors to set down in the assessment roll the full value of all *taxable* personal property of the person, *after deducting the just debts owing by him, had no relation to the taxation of monied corporations.* (46 *Barb.*, 588).

Indeed, the case is an authority for the position taken by the relator in this case; because it is apparent from the reasoning of judge MARVIN, who delivered the opinion of the court, that if the case had been that of an individual, the court would have felt bound to allow a deduction to be made of his *just debts*, irrespective of any reduction on account of United States bonds owned by him. (46 *Barb.*, 596).

IV. The true rule applicable to this case is, we conceive, to be found in the opinion delivered by Judge DENIO, in the case of *The People agt. The Commissioners of Taxes*, (23 *N. Y.*, 195).

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In speaking of the mode in which a bank should be assessed and taxed, he says :

“The position of a bank in this respect is precisely the same as that of an individual tax-payer. It is, as a general rule, assessed and taxed for all its property of every kind ; but there is an exception as to such part of it as the constitution and laws of the Union and of the state have, upon special reasons of policy, declared shall be exempted. Whether such exempt property is found in the hands of an individual or in the possession of a corporation taxed upon the actual value of its capital, the rule is the same. *The exempt property is to be deducted from the aggregate valuation.* (23 N. Y., 195).

Now, in this case, no such rule has been followed. There were two privileges to which the relator was entitled ; his bonds were absolutely exempt, and he was entitled to have his debts deducted from the aggregate valuation of his taxable property. Instead of according to him these privileges or rights, the respondents applied his exempted property to the reduction of his debts, which it was his right and privilege, under the law of the state to have deducted in full from the valuation of his taxable property.

V. The case which is made by the relator commends itself to the court, as one presented in good faith.

The position of the relator is not that of one who has hastily converted his assets into United States securities for the purpose of avoiding taxation.

On the contrary, it is expressly averred, and it is not denied by the respondents, that all the securities of the relator were bought for *permanent investment*, in the years 1865, 1866, and 1867.

The relator is, therefore, not subject to the charge of attempting to evade the tax laws, but is merely standing upon what he in good faith deems his legal rights.

VI. It is submitted, in conclusion, that the papers show that the debts and liabilities of the relator exceeded his

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taxable personal property at the time this assessment was made, and at all times, when the said assessment was before the respondents, and that he is entitled, therefore, to the relief which he seeks by this proceeding.

VII. The assessment in question should be declared illegal and void, and should be set aside.

C. A. ARTHUR, *attorney, and*

CHARLES E. MILLER, *counsel for respondents.*

Statement.—This matter comes before the court upon a *certiorari* issued under the act of 1859, to review the decisions of the respondents as to the assessment of the personal property of the relator for the year 1870.

This personal property, as appears by his own statement is as follows:

Amount invested in business, \$345,895 92. Amount invested in United States stocks, known as five-twenties, \$250,000 00. Total, \$595,895 92. Less debts, \$356,184 49. Balance, \$239,711 43.

The respondents fixed the sum of two hundred thousand dollars, as the value of the personal property of relator, subject to taxation.

Relator claims, however, that in assessing him the commissioners are bound to deduct his debts solely from such of his personal property as is taxable, and that such property is insufficient to pay his debts. That he is taxably insolvent, although worth in personal property two hundred and forty thousand dollars over and above all his indebtedness.

I. The tax commissioners in making their assessments are governed by the provisions of the Revised Statutes. (1 *R. S. p.*, 390, *et seq.*)

Section 9 of article 2, provides that the commissioners shall prepare an assessment roll, in the fourth column whereof they shall set down "the full value of all the taxable personal

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property owned by such person, after deducting the just debts owing by him."

II. The relator to maintain his claim for exemption must establish the proposition, that the legislature by the above cited provision of law intended that the debts should be deducted solely from the property liable to taxation.

III. Such was not the intention of the legislature.

In ascertaining such intention by construction of the statutes, two great underlying principles must be constantly borne in mind :

1st. That the power to levy and collect taxes being an incident of sovereignty, without which no government could exist, all the statutes in derogation of such authority and exempting particular persons or particular classes of property, are to be strictly construed, and confined to their narrowest meaning (*Blackwell on Tax Titles*, pp 2, 406 to 411).

2d. That equality in taxation is the principle by which the legislative power is controlled in the levy of taxes (*Blackwell on Tax Titles*, pp 6-6).

IV. Bearing in mind these principles, it is insisted that the intention of the legislature, as evidenced by the section cited, was simply to establish a rule by which the assessors should ascertain what a person is really worth.

Had they intended that the debts should have been deducted solely from taxable personal property, they would have inserted the word "therefrom," so that the section would read "after deducting therefrom."

They used the words "taxable personal property" as descriptive of what the assessors should insert in their lists, not of what the debt should be deducted from.

V. The exemption that relator claims is not only an exemption of his bonds from taxation, but also from their being considered as liable for the payment of his debts when taxation is concerned. Its practical effect is to create a double exemption.

The doctrine is full of danger, and if carried to its full

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extent must seriously cripple the resources of the state government. The very debts that a person claims to be deducted from his taxable property, are incurred for the purchase of United States stocks, also exempt.

Any one could, as in the present instance, carry on a large business, own an amount of taxable property protected by the laws of the state and at the expense of the other inhabitants of the state, and yet shirk all obligations to contribute to such expense by refusing to apply this personal property not taxable, to the payment of such debts.

VI. The decision of the respondents should be affirmed.

On the hearing at the general term January, 1871, the court ordered judgment on the writ of certiorari for relator, and directed that the assessment should be vacated and stricken from the rolls.

There was no written opinion, the decision being rendered on the argument.

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SUPREME COURT.

MICHAEL BRENN agt. THE CITY OF TROY.

The charter of the city of Troy, in reference to the powers of the common council in opening and widening streets and alleys and keeping the same in repair, &c., (section 1, title 4) says, that "the expense of all new work or improvements and alterations, not in the nature of ordinary repairs, shall be assessed and be a lien upon the property benefited when completed, in sections or as whole, and so certified to the comptroller by the local assessors."

Where the common council, by resolution, directed the city engineer to establish the grade of Oakwood avenue from the Hoosick road northerly to the water works gate; and also directed the proper authorities to advertise for proposals, &c.:

Held, that the *expense* of such work should be assessed upon the property to be directly benefited thereby and not upon the property of the city at large. This was new work and not an ordinary repair, within the true construction of the above provision and all others of the charter bearing on the question.

To justify a *general tax* upon the property of the city for a work or improvement, in the nature of the work in question, two things are required by the charter: 1st. The work must not be new: 2d. It must be only an *ordinary repair*.

Special Term, Troy, June 22d, 1871.

INGALLS, J.

ON the 18th day of May, 1871, the common council of the city of Troy, by resolution, directed the city engineer to establish the grade of Oakwood avenue from the Hoosick road northerly to the water works gate. And also directed the proper authorities to advertise for proposals for grading said avenue, when the grade should be established by the engineer. This resolution has been approved by the mayor, but limiting the expense to a sum not exceeding \$2,500. The city engineer has established the grade, which requires an excavation upon a portion of said avenue varying from a few inches to four and a half feet, and upon another portion thereof requiring a filling varying, from a few inches to

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about four feet. There has been an advertisement soliciting proposals to execute the work, and some bids have already been received, but the contract has not yet been awarded. It is contemplated by the city authorities to let the contract for executing the said work, to the lowest responsible bidder, and to raise the money necessary to defray the expense of said work, by a tax upon all the property liable to taxation within the city of Troy. For the purposes of a highway, the proposed grade is preferable to the present grade.

J. P. ALBERTSON, *for plaintiff*.

R. A. PARMENTER, *for defendant*.

INGALLS, J.—Substantially but one question has been discussed by counsel upon this motion, which is: Whether the money necessary to defray the expense of said work is, by the charter of said city, required to be raised by tax upon all the taxable property within the city, or upon the property to be directly benefited by such improvement.

This presents for determination a simple question of power to tax, which must be derived from the charter and laws not inconsistent therewith. And all considerations of expediency or equality of taxation must be rejected as belonging to the legislature and not to the judiciary. It is the duty of the court to fairly construe and enforce the law as it is enacted, but not to legislate. The 1st section of title 3 of said charter provides as follows: "The legislative powers of said city shall be vested in the common council." Such powers are subordinate to authority of the legislature of the state, and must be exercised in accordance with the charter of said city, and the laws not inconsistent therewith, granted by the legislature. In construing such charter its language must receive a reasonable interpretation with a view to ascertain and effectuate, as far as possible, the intention of the legislature.

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Section 1 of title 4 of said charter provides as follows: "The common council shall have power under the restrictions and limitations hereafter mentioned, and in pursuance of existing laws, not inconsistent herewith, to cause streets, alleys and avenues to be opened and widened, and to be regulated, graded and paved, and the streets, alleys and avenues to be kept in repair, and from time to time to be repaired or regraded and repaired; to provide that lamp posts and lamps be erected; and cisterns made for the purpose of providing water in case of fire; to cause sewers and drains, wells and pumps to be constructed and repaired; and generally cause such other improvements in and about such streets, alleys, avenues and squares, to be made as the public want or convenience shall require. *The expense of all new work or improvements and alterations not in the nature of ordinary repairs, shall be assessed and be a lien upon the property benefited, when completed, in sections or as a whole, and so certified to the comptroller, by the local assessors.*" In my judgment, the latter clause of the above section, reasonably construed, requires the expense of the work in question to be assessed upon the property to be directly benefited thereby, and not upon the property of the city at large. The language employed is clear and unambiguous. "*The expense of all new work, or improvements and alterations not in the nature of ordinary repairs.*" The last expression, "*not in the nature of ordinary repairs,*" used in that connection, is significant, and has the effect to qualify the portion of the section which immediately precedes it, in regard to new work, or improvements and alterations, and aids very much in determining what should be regarded new work within the meaning of said section. To justify a general tax upon the property of the city for a work or improvement in the nature of the work in question, two things are required by the charter: 1st. The work must not be new; 2d. It must be only an *ordinary repair*. It would seem to be an unwarrantable construction to hold that

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a work or improvement involving an excavation and filling of the magnitude of the one contemplated, and attended with such an expenditure of money, and which would wholly change the grade and condition of the avenue, did not constitute a new work, but should be regarded only an ordinary repair of the highway. The very words, "in the nature of ordinary repairs," used in that connection naturally suggest to the mind, the idea that only such work as would be necessary to preserve the highway in its usual condition without any material change in its grade, was intended. If by wear or otherwise it became uneven, it should be repaired by depositing thereon gravel or other material to create an even surface, or if a bridge decayed and became insecure, it should be repaired, or even replaced if necessary, by a new one. These would be regarded in the nature of ordinary repairs, because they would be such as were necessary to the reasonable use and enjoyment of the highway in its usual condition. The improvement contemplated must be fairly considered extraordinary, both in regard to the proposed change in the grade and condition of the highway, and the expense attending the work. Again section 16 of the same title provides, "Whenever an improvement shall be ordered by the common council, contemplated in the foregoing provisions, *except* the opening or widening of streets, alleys and avenues, the expense of such improvement shall, within fifteen days thereafter, be apportioned and charged upon the property and persons benefited thereby." The language employed in this section seems to imply that the city at large can only be taxed in this respect for the purpose of ordinary repairs to the highways, and that all other improvements of this nature must be borne by the persons and property directly benefited. Again, in section 25 of the same title, the expression "*ordinary expenses of repairing streets*" is employed, and in such connection as to indicate that it was the design to limit the nature and extent of such repairs, in which particular it

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is in harmony with the other provisions referred to, in which substantially the same expression is employed. But I deem the following section of said title still more significant, as bearing upon this question of construction: Section 26 provides that the said common council in addition to the foregoing shall and may in each and every year cause a sum sufficient to pay all the ordinary and necessary expenses of maintaining the city government, including the *maintaining of the highways* of said city and the bridges thereon, and the maintenance of the Hudson river between Troy and Albany, to be raised, levied and collected by tax, which sum shall be raised, apportioned, levied and assessed in one tax upon the real and personal property liable to taxation in the city of Troy."

Oakwood avenue is, by section 30 of said 4th title, expressly declared to be one of the highways of said city. In section 26 the expression is, "*maintaining the highways.*" Webster's dictionary, which has become in effect a law book on questions of construction, defines the word "*maintain*" as follows: "*To hold, preserve, or keep in any particular state or condition; to sustain; not to suffer to fail or decline.*" It would certainly be unwarrantable to hold that the work in question was embraced within the terms "*maintaining of highways.*" The change contemplated is too radical and extensive to be regarded as ordinary repair, essential to maintaining the highway in its usual or ordinary condition. Suppose a contract had been entered into by which a party agreed to *maintain the highway in question, and to make all ordinary repairs*, I apprehend no person would contend that such obligation would embrace the improvement in question. The various provisions of the charter, so far as they bear upon this question, seem to be harmonious; and it is quite apparent that it was the intention of the authors of such charter, acting through the legislature to restrict, as far as practicable, the liability of the city to taxation for improvements of the nature of the one in question, and to impose

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the burden upon those who were expected to derive direct benefit therefrom. With the wisdom of such policy we have nothing to do. The question presented by this motion is one of power, not expediency, and if such policy is unwise the legislature must provide the remedy. I, therefore, conclude that the expense of the contemplated improvement, if incurred, cannot legally be imposed by tax upon the city at large, but must be assessed upon the property to be directly benefited thereby.

I have examined the case cited by the city attorney—*The People agt. The City of Brooklyn* (25 Barb., Rep. 585). The particular provisions of the charter of Brooklyn are not stated, and the reasoning of Judge STRONG, in his opinion, does not, in my judgment, conflict materially with the views herein expressed.

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SUPREME COURT.

NATHANIEL BUTOLPH agt. MAX BLUST.

A *constable* or an *alderman*, cannot, at common law, make an *arrest* without warrant, where there is no breach of the peace.

Under the provisions of the charter of the city of Syracuse an *alderman* or *policeman* may arrest any person who may be found committing any violation of an *ordinance* of the city, without warrant—such as cruelly whipping a horse in a public street of the city.

And a *delay* of half an hour in making the arrest, does not deprive the officers of the right to make it. Generally such time is not an unreasonable delay.

But such an arrest cannot be made by these officers *outside* the limits of the city of Syracuse, as where the person arrested, on seeing the approach of the officers stepped over the city limits into the town of Salina—the division line being near him.

Fourth Department, Syracuse General Term, April, 1871.

Before MULLIN, P. J., TALCOTT and JOHNSON, JJ.

THE plaintiff brought this action to recover damages against the defendant for an alleged assault, battery and false imprisonment of the plaintiff by the defendant.

In May, 1870, the plaintiff, (who is a farmer residing in the town of DeWitt, in Onondaga county), visited the city of Syracuse, for the purpose of doing some trading. He was accompanied by his wife, and drove one horse harnessed to a light buggy wagon. On his way home, and when within a very few rods of the line separating the city of Syracuse and the town of Salina, his horse baulked and refused to proceed further. While moderately punishing him, the defendant, who was a stranger to the plaintiff, and who was intoxicated at the time, approached him and told him to whip the horse upon his fore legs, and that he thought that would make him go. The plaintiff complied with the request, and while whipping the horse upon his fore legs, he

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was struck at by the horse in a violent manner, and the plaintiff struck the horse once over the head with the butt end of the whip. The defendant then spoke, and told the plaintiff not to strike the horse again or he would have the plaintiff arrested. The plaintiff replied that he could whip the defendant and the horse too. After that, the defendant went away, and in about half an hour, returned with a policeman. After the defendant went away, the horse was not whipped, nor was there any disturbance at the place of the occurrence; but the plaintiff and others were engaged in trying to push the horse and wagon along, and though making little progress, had gradually approached the city limits, and when the defendant was seen approaching with the policeman, the plaintiff went outside the limits of the city and into the town of Salina; and while in the town of Salina, was, by the policeman, acting under defendant's directions, arrested and brought within the city. The arrest was without process.

The plaintiff was, by the defendant, clinched and thrown violently against the wheel of a wagon, although he did not resist at all or refuse to obey any command.

After the arrest he was taken before a magistrate of the city, and the plaintiff offered to show that the defendant procured a warrant to be issued against him, and that he was tried and acquitted. The evidence, on objection by the defendant, was excluded and the defendant excepted. The defendant was an alderman of the second ward of the city of Syracuse, but at no time during the transaction did he disclose that fact.

At the close of the plaintiff's evidence, the court, on motion of the defendant, non-suited the plaintiff upon the ground that the defendant had a right to arrest within the town of Salina, and that the defendant was justified as matter of law in what he did. To these rulings the plaintiff excepted.

The court directed a stay of proceedings and that the

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exceptions should be heard at general term in the first instance.

I. D. GARFIELD, *for plaintiff, and appellant.*

I. The alderman had no authority to give the plaintiff into custody.

1st. Because an alderman is an officer unknown to the common law, and his powers are defined and limited by the law creating the office, (*section 7, title 4, charter of the city of Syracuse.*)

2d. Under the charter, they have no jurisdiction to arrest or cause to be arrested, without process, any person outside of the city limits.

3d. They can only arrest a person whom they shall find committing a violation of an ordinance.

In the case at bar, the party arrested was, when arrested, beyond the jurisdiction of the alderman. And at the time of the arrest no offense was being committed.

By § 2 of chap. 1, relating to the ordinance of the city of Syracuse, it is provided that,

"The aldermen * * * shall have power to arrest or cause to be arrested, as aforesaid, all persons who shall be found in the act of violating, or who may reasonably be suspected of having committed any crime or misdemeanor, or of having violated any ordinance of the city for the preservation of peace and good order."

Under this ordinance we claim:

1. That the alderman cannot arrest outside of the city.

2. That they cannot arrest, without process, for violation of the ordinance relating to cruelty to animals, *unless the ordinance is being violated at the time.* (*Pow agt. Beckner, 3 Ind. R., 475; Cook agt. Nethercote, 6 C. & P., 741; Coupey agt. Henley, 2 Esp., 540; Fox agt. Gaunt, 3 B. & Ald., 798; Phillips agt. Inell, 11 John., 486.*)

3. That if by its terms, it is to be construed as affording

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authority upon the alderman to arrest outside of the limits of the city, or after the offense has been committed, then it is an authority which the common council of the city of Syracuse, under the charter, had no right to confer upon them, and is void.

If it can be held that the alderman has power to arrest outside the limits of the city, and after the offense had been committed, we say :

II. That it should have been submitted to the jury to say, whether, in making the arrest, the officer was guilty of an assault and battery ; because it was proven :

1. That the plaintiff did not resist the officer, or refuse to obey his commands.

2. That the officer did clinch the plaintiff, and push or throw him violently against the wheel of a wagon, thereby causing the plaintiff a great deal of pain.

And the jury might well have found that this was such an abuse of authority as would entitle the plaintiff to damages. (*Imason agt. Cope, 5 Car. & P., 193*).

III. If it shall be held that the alderman had power to arrest for the past violation of the ordinance, then it must also appear that "he had reasonable cause to suspect the party arrested of having violated the ordinance."

This question of reasonable cause was a question of fact upon the evidence in the case, and should have been submitted to the jury.

It is this aspect of the case in which it is submitted on the part of the plaintiff, that the offer to show the trial and acquittal of the plaintiff was competent, and the evidence should have been received.

The non-suit should be set aside, and a new trial granted.

PRATT, MITCHELL & BROWN, for defendant, and respondent.

I. Cruelly beating or ill-treating a horse is a misdemeanor.

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1. It is made so by statute. (2 R. S., 695).

2. It is made so by the city ordinance. The 6th section of chap. 2 of the ordinances of the city of Syracuse provides that, "any person who shall inhumanly, unnecessarily or cruelly beat, injure, or otherwise abuse any dumb animal, shall be subject to a fine of \$25.

3. By section 6 and 7 of title 4, of the city charter, the power is given to the common council to make ordinances and the violation of them, a misdemeanor. (*Session Laws 1857*).

II. The aldermen of the city have the right to make arrests and take before the police justice, or officer acting as such, any person whom they shall find committing a crime or violating an ordinance of the city.

1. This is given by the city charter. (*Title 9, section 6, and 7*).

2. This power is still more enlarged by the city ordinance, (*Chap. 1, § 2*), which provides that, "the aldermen shall have power to arrest or cause to be arrested, all persons who shall be found in the act of violating, or may reasonably be suspected of having committed any crime or misdemeanor, or having violated any ordinance of the city," &c.

It is not necessary that the arrest should be made while the crime is being committed, but it is sufficient that it be done within a reasonable time.

(a). By the ordinance it may be made after the crime has been committed and upon the information of others.

(b). Aldermen have the right to arrest any one whom they find committing a violation of any ordinance, &c. (*charter, title 4, § 7*).

(c). As no time is prescribed within which an arrest shall be made, it is sufficient that it be done within a reasonable time.

(d). In this case, the officer was threatened by the plaintiff, if he should attempt to arrest him, to lick him and the

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horse too. As soon, therefore, as he could procure necessary assistance, he made the arrest (*Reg. agt. Light, Bears and B.*, 332; 7 *Cox, C. C.*, 389; *Taylor agt. Strong*, 3 *Wend.*, 384, 386; 1 *Chitty's Gen'l Prac.*, 619).

III. In this case the crime was not committed in the presence of the officer, but when he attempted to prevent its continuance, plaintiff refused to desist, and threatened to commit a breach of the peace.

1. He whipped the horse, and struck him over the head with the butt-end of his whip, threatened to knock him down, and called for a club for that purpose.

2. When ordered to stop, or the defendant would cause him to be arrested, he threatened to lick both defendant and the horse.

3. The evidence was ample to show that a misdemeanor was committed, and it was not disputed upon the trial.

4. Besides, it was a matter for the officer to decide whether the treatment of the horse was inhuman or cruel. He would not, therefore, be liable had he decided erroneously.

IV. It is no objection to the power of the defendant to arrest plaintiff that the latter, to avoid being arrested, slipped out of the city limits.

1. The power given by the charter and ordinances to arrest is general, without limitation as to place or locality. The court should not prescribe limits for the exercise of this authority, which the statute has not prescribed.

2. If a warrant had been issued, the plaintiff would have been liable to arrest anywhere in the county. It is not, therefore, perceived why, in cases where an arrest may be made without warrant, the jurisdiction of the officer as to locality is not equally extensive.

3. It would be a very inconvenient restraint upon police officers, and their efficiency for keeping good order would be greatly impaired, if crimes, misdemeanors and breaches of the peace can be committed in their presence, and when

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they attempt to arrest the criminal he can escape by running out of the city.

(a). By such a construction the whole policy of the law justifying arrests without process, would, in many cases, be defeated.

(b). When offenses happen to be committed near the boundaries of the city, arrests could rarely be made, and unless the officers were the fleetest runners, arrests could not be made in any case.

4. Aldermen of cities are made by statute magistrates, to keep the peace, and have power to issue warrants, which may be executed anywhere in the county (2 *R. S.*, 727, § 1, 729, § 1 and 4).

(a). As such magistrates, they have general power to arrest for crimes committed in their presence, or for threatened breaches of the peace (1 *Bishop Crim. Pro.*, Sub. 34; *Law of Arrests*, 171; *Holcomb agt. Cornish*, 8 *Com.*, 375).

(b). As conservators of the peace and officers of the government, they have authority derived from the general rights of the government without any statute whatever upon the subject, to exercise all necessary force for the prevention of crime, either by arrest of individuals, or by the seizure and detention of the instruments of crime (*Bishop Sup.*, 640; *Spalding agt. Preston*, 8 *Vermont*).

5. They seem also by the charter to have the same authority as policemen to make arrest without process, and policemen have the same power in criminal matters as constables of towns and counties (*Title 5*, § 5).

6. At common law, a sheriff or constable, although strictly a county officer, might pursue and arrest a felon in another county, either with or without warrant (2 *Hale's Pleas of the Crown*, 94).

7. By all the analogies of the law, therefore, by every consideration of public policy, an officer of the city should not be confined to the limits of the city, in making an ar-

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rest where the crime is committed in the city within his own view.

V. There was no question for the jury as to the good faith of the defendant in making the arrest.

1. There was no proof of bad faith.

2. The evidence shows that not only a statutory crime was committed, but a violation of an ordinance of the city. It was, therefore, not material with what motive he made the arrest.

VI. The motion for a new trial should, therefore, be denied.

By the court, MULLIN, P. J.—The defendant was an alderman of the city of Syracuse. In May, 1870, the plaintiff was in the city with his horse and wagon. The horse balked and the plaintiff beat him with his whip on the legs and struck him with the butt of it on his head. The defendant saw the whipping and deeming it cruel, told the plaintiff to desist or he would have him arrested. The plaintiff told defendant he would whip the horse and him too. The defendant went for the police officer to make the arrest. He returned in about half an hour, and the plaintiff seeing them approach, went across the city line into the town of Salina. The defendant while the plaintiff was in Salina, directed the police officer to arrest him, and he did so. The officer had no process authorizing the arrest. He made it on the authority of the defendant.

After the arrest was made some violence was done to plaintiff's person. He was taken before the police justice of Syracuse, and an examination had.

The action was for damages resulting from the imprisonment which is alleged to be false. The court non-suited the plaintiff and directed the case to be heard on the exceptions in the first instance at the general term.

Cruelty to an animal is a misdemeanor, as well by the Revised Statutes, (*See 2d Statutes at Large*, 717, § 26), as by

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the by-laws of the city of Syracuse (*Section 6, chap. 2 of the ordinances*).

By the charter of the city, (§ 6, 7, of title 4 of the laws of 1857, chap. 63), the violation of the ordinances of the common council is declared to be a misdemeanor.

By section 1, title 2, chapter 2, part 4 of the Revised Statutes, aldermen of cities are authorized to execute the power conferred in that title.

The powers thus conferred are to hear complaints against persons accused of crime, issue process for their arrest, take the examination when the prisoners are brought before them, and in certain cases to let them to trial.

At common law, an arrest could not be made of a person charged with a misdemeanor, except on the warrant of a magistrate, unless it involved a breach of the peace in which case the offender might be arrested by any person present at its commission. (1 *Chitty Crim. Law.*, 15; *Carpenter agt Mills*, 29 *How.*, 473). But in cases of felony it might be, (*same*; *Haley agt. Mix* 3 *Wend.*, 350).

It is said in (2d *Haley's Pleas to the Crown*, 86), that if a justice of the peace see a felony or other breach of the peace committed in his presence, he may, in his own person, apprehend the felon. And so he may command any person to apprehend him, and such a command is a good warrant without writing. But if the felony or other breach of the peace be done in his absence, then he must issue in writing under his seal to apprehend the malfactor, and if there be any riot or breach of the peace likely to happen by a tumultuous meeting, &c., he may command his servants or others to prevent it by arresting the parties.

A constable, it is said, by the same author, may by his own inherent and original power, imprison a person for a breach of the peace, and certain specified misdemeanors less than felony, but the offense of which the plaintiff is charged is not one of them. (2 *Hale's Pl.*, 90).

It said that in case of an affray the constable may with-

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out warrant arrest, in order to prevent it; yet, if the affray be past and no danger of death, he cannot arrest without a warrant. But *Hale* is of opinion that in such case, the constable may arrest, and take the prisoner before a justice to find surety of the peace, or for appearance.

When a felony is committed, or in case of suspicion of felony, the accused flies into another county, the constable pursuing him may follow him into an other county, and arrest him; but, when he makes the arrest, he must take the prisoner before a magistrate of the county in which the arrest is made (2 *Hale's Pl.*, 94).

It follows that at common law neither the defendant nor the constable, could arrest the plaintiff without warrant, as there was no breach of the peace.

It remains to inquire whether it could be done by either under the charter of the city.

Section 7 of the charter provides, that it shall be lawful for any alderman and policeman to arrest, retain, and take before the justice every person whom they or any of them shall find committing a violation of any ordinance of the city.

By this section, the officers named in it, are clothed with powers belonging to sheriffs, constables and police officers. And they may be exercised without warrant. The object, unquestionably was, to authorize summary arrests and to obviate the delay incident to procuring a warrant.

The defendant found plaintiff committing a violation of an ordinance of the city and was, therefore, authorized to arrest him, and call in the aid of the police officer to effect it as might a justice of the peace at common law, when a crime was committed in his presence. (2 *Hale*, 86).

The delay of half an hour in making the arrest in the case, did not deprive the defendant of the right to make it.

In *Regna agt. Walker*, (25 *E. L. & E.*, 589), it was held that an arrest made by a constable for resisting him in

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making an arrest two hours after the resistance, was unlawful.

In *Taylor agt. Strong*, (3 *Wend.*, 384), it is said, that an arrest without warrant for breach of the peace in the presence of an officer, may be made in a reasonable time, (*See also Discounts agt. Corbisly*, 85, *E. C. L.*, 187), what is a reasonable time is upon undisputed facts for the courts, and half an hour is not in my opinion, an unreasonable time.

If an arrest cannot be made except immediately on the commission of an offense in many cases, offenders would escape punishment.

In case of an offense committed by a number of persons in the presence of an alderman, he would be incapable of arresting them if they resisted. If he may not delay arresting until he can procure help, punishment would be rendered impossible.

I have no doubt, but that the arrest was properly made, provided it could be made outside the limits of the city.

I do not find any authority upon the question, whether in cases of misdemeanor an officer authorized to arrest for an offense committed in his presence, may pursue the offender out of his own jurisdiction. At common law it was the duty of such an officer, in case of felony, to raise the hue, and cry, and then pursue the criminal into any other jurisdiction, and there arrest him.

This power being limited to cases of felony, it would seem, that no such right of pursuit existed in cases of misdemeanors.

At common law, an arrest on warrant must be made within the jurisdiction of the officer who issued it. (1 *Chitty's Crim. Law*, 49).

It would be somewhat singular if an officer without warrant could arrest beyond his jurisdiction, when, upon his warrant he could not.

In felony, an arrest upon a warrant of a justice, could be made any where within the county, (1 *Chitty Crim. Law*,

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49), but in cases of misdemeanor, the arrest must be made within the jurisdiction of the officer issuing it.

Violations of municipal regulations could be committed with impunity, if the officer who is present at the commission of the offense, must stop at the city or village boundery when in pursuit of the offender, because his jurisdiction there ends. Yet, I find no case that authorizes him to arrest beyond the village or city limits.

No such right existed at common law, when the officer was without warrant, and I know of no provision of law, that authorizes it now.

The nonsuit must be set aside, and a new trial ordered, costs to abide the event.

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COURT OF APPEALS.

DAVID C. FOSTER, appellant, agt. CORNELIUS VAN WYCK,
et al., assessors, &c., respondents.

GEORGE VAN KLEECK, appellant, agt. FREDERICK WOOD-
RUFF, collector, &c., respondent.

CHARLES W. SWIFT, appellant, agt. THE CITY OF POUGH-
KEEPSIE, respondent.

Taxation of all property is the general rule of the statute. It provides as follows:
"All lands, and all personal estate within this state, whether owned by individuals
or corporations, shall be liable to taxation, subject to the exemptions hereinafter
specified," (1 R. S., 387, § 1, 1st ed.).

By the same statute (p. 390, § 8), it is made the duty of the *assessors*, "to ascertain,
by diligent inquiry, the names of all the taxable inhabitants in their towns or
wards, and also all the taxable property, real and personal, within the same."

Bank shares, owned by inhabitants of the towns or wards within the jurisdiction of
the assessors, falls within the description of property declared by the first section
of the act above quoted, to be liable to taxation.

It may also fall within one of the exemptions; but being property *prima facie* liable
to taxation and the duty of the assessors being to ascertain all the taxable prop-
erty, real and personal, within their town or ward, this property presents itself
to them for their decision whether it is taxable or exempt from taxation.

It being personal property within their town or ward, it is within their jurisdiction,
as assessors; they have the right, and it is their duty, to examine the question
whether it is liable to taxation, and this is a *judicial* inquiry.—One in which the
highest courts have differed; and should they make a mistake, and hold it liable
to taxation when it is not, they should not, for such mistake, be held liable as
wrongdoers.

And it makes no difference whether this immunity from taxation arises from state
law or national law. It is equally a judicial decision, of the assessors in either
case, having equal protection from liability for having decided erroneously.

If the assessors, having jurisdiction of the subject matter and of the persons of the
owners of the property assessed, have failed to follow the *directions of the statute*
in making up their roll, their action is irregular and open to correction upon
proper application to the supreme court; voidable but not void.

June Term, 1867.

THESE are controversies submitted to the supreme court,
without action, pursuant to section 372 of the Code.

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The facts stated to the court in the several submissions, which are substantially alike, show that the plaintiffs are residents of the city of Poughkeepsie, and respectively owners of shares in three national banks, organized under the act of congress, approved June 3, 1864, and located in said city.

The assessors of that city, in the year 1865, assessed the plaintiffs, respectively, for their shares in the said banks, at their par value. The plaintiffs did not personally appear before the assessors, nor serve any claim or notice on them in reference to said assessment. The assessors made out an assessment roll in the form prescribed by statute, on which each of the plaintiffs were assessed and taxed for other property; and at the close of the alphabetical list, and on a separate part of the roll, they inserted the names of the said national banks, and the value of the real estate of each, and then, under the name of each bank so entered, they entered the names of the shareholders therein, respectively, the numbers of the shares owned by each, and the par value thereof; and the common council imposed and extended the tax upon the real estate of each bank, and upon each shareholder for the value of his shares so entered.

The cashiers of the banks, before the completion of the roll, notified the assessors that such last mentioned assessments were illegal, and demanded that they should be stricken from the roll. This was refused by the direction of the common council; a warrant was issued to the collector, under the seal of the city and the hand of the mayor, attached to the assessment roll, and with it delivered to the collector, commanding him to receive, levy, and collect, from the several persons therein named, the several taxes therein imposed.

Under this warrant, the collector, on the 7th of June, 1866, levied and collected the several taxes imposed on such bank shares of the plaintiffs, respectively, of their goods and chattels, and did forthwith pay the same to

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the chamberlain of said city, who is, *ex officio*, treasurer thereof.

On the part of the plaintiffs it is claimed, that the said assessments, and all proceedings based thereon, were without jurisdiction and void ; and that the levy on their goods and chattels, in pursuance of said warrant, and by direction of said city, was a trespass, for which the defendants, respectively, are liable to the plaintiffs, in the amount so collected from them.

On the other hand, the defendants claim that the assessors had jurisdiction in the premises, and admitted that the bank shares were exempt from taxation; that the defendants, respectively, are not liable to any action by reason of said assessments, &c., but that the plaintiffs, having omitted to institute legal proceedings to compel the correction of said assessment roll, by the court or otherwise, are remediless in the premises.

The supreme court held, that the plaintiffs were neither of them entitled to recover, and gave judgment for the defendants, respectively, to that effect, and for costs.

From the judgment thus given the plaintiffs severally, appeal to this court.

PARKER, J.—The question in each case is, did the assessors have *jurisdiction* in respect to the assessments complained of? for it is not denied, on the one hand, that under the decision of the supreme court of the United States, in *Van Allen agt. The Assessors*, (3 Wallace, 573), that the assessment was unauthorized, and would have been set aside upon due application to the supreme court, as not being in accordance with law ; nor, on the other, that if the assessors had jurisdiction in the matter, and have erred only in its exercise, the only remedy of the plaintiffs was such application to set it aside ; and that no action for the irregularity would lie against any of the defendants ; except that in the case of *Swift agt. The City of Poughkeepsie*, it

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is claimed by the plaintiff that, even if the assessors had jurisdiction, so that they and the collector are not liable, still as the plaintiff was not legally liable to taxation on his bank shares, the city, which has received the money collected from him to satisfy such illegal tax, is legally liable to refund it to him.

That the assessors had jurisdiction in the matter, cannot, I think, be successfully disputed.

Taxation of all property is the general rule of the statute. It provides as follows: "All lands, and all personal estate within this state, whether owned by individuals or corporations, shall be liable to taxation, subject to the exemptions hereinafter specified" (1 R. S., 387, § 1, 1st ed.). By the same statute (p. 390, § 8), it is made the duty of the assessors "to ascertain, by diligent inquiry, the names of all the taxable inhabitants in their towns or wards, and also all the taxable property, real or personal, within the same." It is not denied that the assessors had jurisdiction of the plaintiffs, as taxable inhabitants of their towns or wards. As to the property in question, it falls within the description of property declared by the first section of the act above quoted to be liable to taxation. It is "personal estate," as the same is defined by the third section of the act, the term including "public stocks," and "stocks in monied corporations." It may also fall within one of the exemptions; but being property *prima facie* liable to taxation, and the duty of the assessors being to ascertain all the taxable property, real and personal, within their town or ward, this property, held by residents of their town, presents itself to them for their decision whether it is taxable or exempt from taxation. That it shall turn out to be exempt from taxation does not exempt it from the scrutiny required of them by the statute to ascertain whether or not it is taxable. Being personal property within their town or ward, it is within their jurisdiction as assessors; they have the right, and it is their duty, to examine the question whether it is liable to taxa-

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tion, and this is a judicial inquiry (1 *Kern.*, 593; 3 *Denio*, 117)—one, it may be remarked, in which the highest courts have differed; and should they make a mistake, and hold it liable to taxation when it is not, surely they should not, for such mistake, be held liable as wrongdoers (*Chegary* agt. *Jenkins*, 1 *Seld.*, 376; *Barhyte* agt. *Shepherd*, 35 *N. Y. R.*, 238; *Vail* agt. *Owen*, 19 *Barb.*, 22; *The Rochester White Lead Co.* agt. *The City of Rochester*, 3 *Coms.*, 463).

One of the classes of property expressly exempted by section 4 of the act from taxation is, "Every building erected for the use of a college, incorporated academy, or other seminary of learning." In *Chegary* agt. *Jenkins* (*supra*), the building occupied by the plaintiff as a young ladies' boarding and day school, was taxed, she claiming that it was exempt; and the collector levied on her property to collect the tax. Judge RUGGLES, in his opinion, discussing the question of jurisdiction, says: "The assessors, in determining whether the plaintiff's property was taxable as a dwelling, or exempt as a seminary of learning, acted judicially, and within the sphere of their duty* * * * Having the general authority to make assessments for taxation within the ward in which the plaintiff's property was situated, they had jurisdiction of the subject-matter of the assessment in question." (See also *Henderson* agt. *Brown*, 1 *Caine's R.*, 92). Section 4 of the act, in effect allows ministers of the gospel to hold property to the amount of \$1,500 exempt from taxation. In *Barhyte* agt. *Shepherd* (35 *N. Y. R.*, 238), the plaintiff, a minister of the gospel, sued the assessors for refusing to exempt him from taxation, although his real and personal estate were less than \$1,500; and it was held that the assessors had jurisdiction to decide whether the plaintiff's property was exempt or not; and, in so deciding, acted judicially, and were not liable for assessing the plaintiff upon his property, even though it was exempt from taxation.

It cannot be said that the bank shares in these cases were

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any more absolutely exempt from taxation than "a building erected for the use of a seminary of learning," or the farm of a minister of the gospel, occupied by him, and of a value not exceeding \$1,500. If the building on the farm turns out to be exempt, because found to be in the category of exemptions, it is as absolutely non-taxable as the bank shares in question; and yet the assessors are not liable for improperly including it in the assessment, because they are invested by the statute with authority to decide what property is taxable, and in so deciding act judicially.

It can make no difference, I apprehend, in regard to the assessor's jurisdiction, whether this immunity from taxation arises from state law or national law. In either case, the question of liability to taxation is to be determined by the assessors, and they have, of course, jurisdiction to decide it.

It is equally a judicial decision in either case, having equal protection from liability for having decided erroneously.

It is impossible to make any distinction, in respect to the subject under consideration, between the case at bar and the cases last cited; and, as was said by Judge LEONARD in *Barhyte agt. Shepherd*, after remarking upon the holding in *Mygatt agt. Washburn* (15 N. Y. R., 316), that assessors have no jurisdiction to assess a non-resident for personal property: "It is not necessary to extend the application of the rule on any ground of public policy, that I can perceive, so as to include cases of mistake, in deciding a claim to exemption, where the person and estate of the party are within the jurisdiction of the assessors."

The circumstance that the assessment of the bank shares was separate from the other personal property of the plaintiffs, and specifically upon the shares does not affect the question of jurisdiction. If the assessors having jurisdiction of the subject-matter, and of the persons of the plaintiffs, have failed to follow the directions of the statute in making up their roll, their action was irregular and open to

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correction upon proper application to the supreme court ; voidable, but not void (*Easton agt. Calendar*, 11 *Wend*, 91, 95 ; *Cunningham agt. Bucklin*, 8 *Cow.*, 187 ; *Wilson agt. The Mayor, &c., of New York*, 1 *Denio*, 595, 599 ; *Butler agt. Potter*, 17 *John R.*, 145 ; and cases above cited). The rule is stated in *Easton agt. Calendar* as follows : " Where the magistrate or officer has jurisdiction of the subject-matter, and errs only in the exercise of it, his acts are not void, but voidable, and the only remedy is by certiorari or writ of error.

In regard to the liability of the city of Poughkeepsie to refund the taxes paid into its treasury, and under the assessments in question, I am unable to see how it can be. The assessment was not void, but irregular or erroneous ; and the only mode of avoiding such an assessment is by an application to the assessors, or by a proceeding in the supreme court to correct the errors or irregularities while the assessment stands unreversed ; it is as effectual to protect not only those by whom it was made and executed, but all persons claiming under it as a judgment of a court having jurisdiction. It would be an error to hold that no liability attached to those who instituted and carried out the proceedings to compel the payment of the money by the plaintiffs (there being no statutory protection), and yet that the individual or corporation who received it is legally liable to refund it.

The cases cited by the learned counsel for the appellants holding, that " when a tax has been *illegally* assessed and collected, the money may be recovered back," are cases where there was in the view of the court a want of jurisdiction. In *Osborn agt. Danvers* (6 *Pick.*, 89), it was held that when a taxable inhabitant is overrated by assessors, whether by including in the valuation, property of which he is not the owner, or *that for which he is not liable to be taxed*, that does not render the assessment invalid or void, and his only remedy is by an application to the assessors, or the court of

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sessions, which is authorized to relieve in such cases, and not by an action for money had and received.

I am of the opinion that the judgment appealed from should be affirmed.

As to the case of *Foster* agt. *Wan Wyck, et al.*, assessors, and *Van Kleeck* agt. *Woodruff*, collector, all the judges concur in affirming the judgments.

As to the case of *Swift* agt. *The City of Poughkeepsie*, a sufficient number of the judges to give a judgment failing to concur, a re-argument in that case is ordered.

Judgment affirmed in the first and second cases, and re-argument ordered in the third case.

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SUPREME COURT.

ELIZA PIERCE agt. THOMAS J. CHAMBERLAIN, and others,
executors of, &c., of BENJAMIN CHAMBERLAIN, deceased,

Where the testator, by his will, required his executors to pay to a trustee \$4,000 to be invested in the best manner, and the interest to be paid by him, semi-annually to the plaintiff, during her life, and at her decease to pay the principal to her heirs :

And then directed his executors to pay the legacies mentioned in his will as fast as they might be able to do so without sacrificing his estate, but to pay all except such as were directed to be paid at a future day, within two years from the period of his decease :

Held, that the plaintiff was entitled to the benefit of her legacy, and consequently the interest thereon, from the period of the testator's decease. There was to be no such conversion of one species of property into another, as under the authorities would lead to a postponement of that benefit for any period of time whatever.

Cattaraugus Circuit, June, 1871.

THIS action was tried before Mr Justice DANIELS, without a jury, and was brought to recover the interest upon a legacy of four thousand dollars left by the defendant's testator in his will for the plaintiff's benefit. The defendants were constituted the executors of the last will and testament of Benjamin Chamberlain, deceased, and letters testamentary were issued to them on the 22d of April, 1868, and they took possession and control of the testator's estate, as executors, from the time of his death, which event occurred on the 10th of February, 1868. The remaining facts appear in the opinion.

CONGDON & CONGDON *for plaintiff.*

HENDERSON & WENTWORTH *for defendants.*

DANIELS, J.—When the testator died he left personal

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estate amounting to the sum of one hundred and ten thousand dollars, all of which was drawing interest, except the sum of ten thousand dollars invested in bank stock, and that was earning dividends. This personal estate exceeded what was required to pay all the debts owing from, and all the legacies given by the testator. Forty thousand dollars consisted of money on deposit in the hands of Truman R. Colman, who was by the testator's will appointed the plaintiff's trustee. This deposit was held under an agreement that Colman should pay seven per cent. interest on it, and that it should not be drawn without giving him six months notice. The residue of the personal estate, except the bank stock, consisted of bonds and mortgages drawing interest.

By the testator's will, he required his executors to pay to Colman four thousand dollars, to be invested by him in the best manner, and the interest and income to be paid by him semi-annually to the plaintiff, the testator's adopted daughter, during her life, and at her decease to pay the principal to her heirs.

The testator directed his executors to pay the legacies mentioned in his will as fast as they might be able to do so without sacrificing his estate, but to pay all except such as were directed to be paid at a future day, within two years from the period of his decease.

In this condition of the testator's personal estate and under these provisions of the will, there can be but little room for doubt that the testator designed that the plaintiff should have the benefit of the legacy provided for her, from the period of his own decease. This construction is sustained by the case of *Cook agt. Meeker* (36 N. Y., 15), and the cases referred to in the opinion. There was to be no such conversion of one species of property into another as under the authorities would lead to a postponement of that benefit for any period of time whatever (*Id.*, 2).

The plaintiff was accordingly entitled to interest on the legacy from the decease of the testator to the time when so

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much of the fund on deposit with Colman was set off to him, by the executors, as trustee for her, as was required to comply with the directions given by the testator, for her benefit.

The testator died on the 10th of February, 1868, and on the fifteenth of the following month of August, four thousand dollars of the deposit in his hands was transferred by the executors to Colman in trust for the benefit of the plaintiff, but the interest accruing on the legacy intermediate those periods was withheld by the executors. This interest the plaintiff is entitled to recover, and she must have judgment that the executors pay it to her, and that she recover the costs of this action against the assets in their hands as executors pursuant to section 317 of the Code.

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COURT OF APPEALS.

WILLIAM BARKER agt. WILLIAM WHITE, and others.

Where the evidence on the trial presents a question of *fact* for the referee to decide, his finding on such fact must be held conclusive on the parties.

Where the action is in equity, the giving or withholding of *costs* is in the discretion of the referee. As a general rule the court will not attempt to control that discretion on appeal. Certainly not except in case of its palpable abuse.

The plaintiff having failed in the action on the principal subject of litigation; recovering however on one minor branch of it, was allowed his costs of action, excepting two-thirds of the disbursements, and was charged with the costs of one of the defendants defense:

Held, that the adjustment of the costs was not so unfair and inequitable as to require this court to interfere with the decision of the referee.

June Term, 1867.

BOCKES, J.—This action was in equity, by one member of a partnership to enforce certain claims against the other members, growing out of the firm business.

It was referred to a referee to hear and determine, who reported in favor of the plaintiff as to one claim, and against him as to the other; and the referee adjusted the costs between the parties by allowing them in part to the plaintiff, and in part against him, to the defendants.

Judgment was entered as directed by the referee. The plaintiff appealed therefrom to the general term, in so far as his claim set forth in the complaint was disallowed, and also as to the adjudication of the question of costs. The judgment was affirmed at general term, and the plaintiff appealed to this court.

In the complaint the plaintiff charged, that during the continuance of the partnership one of the firm, George W. Sherman, now deceased, whose estate is represented in this

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action by his administratrix and administrator, had in his possession the sum of six hundred dollars, which belonged to the firm, and which sum he loaned to one Albert Rodgers, on his own individual responsibility, promising to make the sum good to the firm; that such sum had never been repaid to the firm; and he claimed that Sherman's estate should be charged with this sum and interest.

The referee found in favor of the plaintiff on this allegation, and allowed a recovery in his favor, and against Sherman's estate, for his proportion of the claim. In this determination of the referee the parties acquiesced, neither appealing therefrom. This branch of the case, therefore, requires no examination.

The plaintiff also charged in the complaint, that during the continuance of the copartnership he lent and advanced to the firm, of his own individual funds, the sum of one thousand dollars, which sum was used in the partnership business, and that the firm gave him a promissory note therefor, dated April 24, 1854," signed in the firm name, and that he still held the same, which was due and wholly unpaid; and he claimed that this sum should be charged against the members of the firm, respectively, in due proportion.

This allegation of the complaint was denied by the other parties; and they averred, on information and belief, that if any such paper existed it was made and placed in the plaintiff's hands for a special purpose, to which it was never in fact appropriated, and that it never had any legal existence as a valid instrument binding on the firm.

The litigation before the referee was confined principally to this branch of the case, and the appeal was brought to review the decision of the referee thereon.

The note described in the complaint was produced by the plaintiff, and was put in evidence.

The signature was shown to be in the handwriting of Mr. White, a member of the firm.

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The plaintiff gave evidence tending to prove that the note was given him for money loaned, as alleged in the complaint.

On the other hand the evidence offered by the defendants tended strongly to contradict the plaintiff's case, and left it quite doubtful, if not entirely improbable, that the note was given under the circumstances and for the purpose asserted by the plaintiff. The evidence certainly made it a question of fact for the referee. He found emphatically against the plaintiff—that he did not lend or advance the one thousand dollars to the firm, nor did the firm make and give him the firm note, as alleged in the complaint; nor was that sum due and owing to him from the copartnership; and while he found that the note was signed by the firm name, in form as stated in the complaint, yet he also further found, that it was never held and owned by the plaintiff, as claimed by him. This finding of fact on the evidence must be held conclusive on the parties, and as a consequence determines the case against the plaintiff, in so far as he made a claim against the other members of the firm, on the note. His case was not sustained on this point of the litigation, and the judgment in that regard was properly affirmed by the general term.

No other question is raised on this appeal on the merits.

It is insisted, hence, that the referee erred in the adjustment of the costs between the parties. The action being in equity, the giving or withholding of costs was in the discretion of the referee. As a general rule, the court will not attempt to control that discretion on appeal. Certainly not except in case of its palpable abuse.

Such is not this case.

The plaintiff failed in the action on the principal subject of litigation; recovering, however, on one minor branch of it. He was allowed his costs of the action, excepting two-thirds of the disbursements, and was charged with the costs of White's defense.

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We cannot see that the adjustment of the costs between the parties was so unfair and inequitable as to require this court to interfere with the decision of the referee.

The judgment of the supreme court should be affirmed, with costs of the appeal against the appellant.

All concur.

Affirmed.

People agt. Lewis.

COURT OF APPEALS.

THE PEOPLE, plaintiffs in error, agt. RICHARD LEWIS, defendant in error.

The question whether the *evidence* justified the verdict of the jury, finding the defendant guilty of murder in the first degree, cannot be examined in this court.

Evidence offered as to the acts and declarations of the defendant, after the perpetration of the crime, is not admissible in his behalf.

Where the real issue on the trial was, whether the defendant *designed* to effect the death of the deceased, evidence offered by the defendant to prove the facts and circumstances constituting the provocation, which induced the attack by him upon the deceased, which occurred a few minutes previous to such attack, was admissible upon the question of such design, especially where the acts of the defendant were such as not at all likely to produce death.

September term, 1867.

APPEAL from the decision of the general term, awarding the defendant a new trial, on a conviction for murder.

A. H. ANTHONY *for plaintiffs in error.*

H. A. NELSON *for defendant.*

GROVER, J.—Questions of law only can, in this class of cases, be reviewed in this court. The question whether the evidence justified the verdict of the jury, finding the defendant guilty of murder in the first degree, cannot be examined here. The evidence offered as to the acts and declarations of the prisoner, after the perpetration of the crime, were properly excluded. Such acts and declarations were not admissible in his behalf. This is the settled rule, and requires no discussion. The real issue upon the trial was whether the defendant *designed* to effect the death of

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the deceased. If he did, he was guilty of murder in the first degree; if he did not, he was not so guilty. The prisoner used no weapon; all he did to deceased was with his fists.

The prosecution proved that threats against the deceased had been made by the prisoner some time previous to the occurrence. The prisoner offered to prove that a few minutes before he made the attack upon the deceased, he went to the house where he lived, and where his father's family lived, and found his sister crying, and inquired as to the cause, and was informed by her that the deceased had just been there, and called her mother and herself prostitutes, whereupon the prisoner went directly into the lot where the deceased was, and inquired of him why he had so done, and immediately struck him with his fist.

This evidence was excluded, and the prisoner's counsel excepted. It is clear that if the defendant designed to effect the death of the deceased, this evidence had no tendency to mitigate the crime from murder to manslaughter, and was not admissible for any such purpose. But upon the question whether he did so intend, the evidence ought to have been received. The acts of the prisoner were such as not at all likely to produce death, and upon the inquiry whether such was his design, it was very important to ascertain whether he acted from deliberate malice, long entertained, or from recent provocation likely to induce such acts as the prisoner committed. In the former, the conviction that a design to effect the death of the deceased prompted the commission of the acts, would be much more readily arrived at than it would were such acts induced by a recent provocation, which would be likely to induce the prisoner to chastise the deceased. Upon this ground only, the evidence should have been received. The learned judge erred in rejecting it, and thereby leaving the jury to infer that the defendant acted from deliberate malice, long entertained. The latter conclusion would be the necessary result of

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excluding the evidence. Upon this ground, the prisoner was entitled to a new trial, and the judgment of the supreme court awarding it must be affirmed.

Many cases were cited by the counsel for the people, where similar evidence was excluded. But these were all cases where there was no doubt as to the intention of the prisoner to effect the death of the deceased, and where the only inquiry was whether, conceding such intention, the offense was murder or manslaughter. In such cases the law is well settled that the crime cannot be mitigated from murder to manslaughter by anything the prisoner may have heard from a third person. In such a case the law adjudges that the prisoner acted only from revenge, and this constitutes murder.

When the provocation arises in the presence of the prisoner, and the act causing death immediately follows, the inquiry is, whether the provocation was such as to cause such a frenzy, as for the time to deprive the prisoner of his reason, to an extent that he was not capable of deliberation. If so, he is guilty of manslaughter by effecting the death of the deceased. If otherwise, the crime is murder.

Judgment of the general term should be affirmed.

Affirmed.

DAVIS Ch. J., and HUNT, J., dissenting.

Emerson agt. Bleakley.

COURT OF APPEALS.

JESSE M. EMERSON, successor of ROBERT GRANT, deceased,
assignee of WILLIAM MONTGOMERY, respondent, agt.
WILLIAM BLEAKLEY, Jr., sheriff, &c., appellant.

Where the cause of action survives by virtue of the statute, section 121 of the Code saves the action from *abatement*, on the death of a party.

Where personal property is held *in trust*, on the death of the trustee, it passes, under the common law, to his personal representatives, who are bound to execute the trust.

The Revised Statutes relative to uses and trusts, does not relate to *personal property*, but the common law rule still exists, and applies in reference to such property.

Where, on the death of a plaintiff in an action, who sues as trustee, the court appoint a person in place of the deceased, to execute the trust, upon the express consent and stipulation of the defendant, the latter cannot on motion, at the trial, have the complaint dismissed, on the ground that the title to the property was in the personal representatives of the deceased.

June Term, 1867.

ON or about the 17th day of December, 1859, one Alfred Booth obtained a judgment in the Supreme Court, Westchester county, against William Montgomery, and William Garabrant for \$2,268 38 on two promissory notes made by said "Montgomery & Co."

On the 20th day of December, 1859, the said Booth caused an execution on said judgment to be issued against the property of said Montgomery and Garabrant, to the defendant in this suit, William Bleakley, Jr., who was at that time sheriff of Westchester county.

On the 20th day of October, 1857, a stock company was organized by William Montgomery and four others, by the title of the "New York Steam Saw-Mill and Machine Company."

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On the 21st day of October, 1857, one day after the date of the certificate of incorporation of said company, William Montgomery and George D. Lund (who had become a partner of Montgomery in the place of Garabrant) for the consideration of \$100,000, made a bill of sale of "all the materials, good will and appurtenances of whatever kind or nature appertaining and belonging to the manufacturing and machine business heretofore conducted under the name of William Montgomery & Co., in the town of Yonkers, Westchester county, N. Y., together with the full right to the immediate occupancy of the premises in which said property was contained in Yonkers," &c., &c., to the said New York Steam Saw Mill and Machine Company.

On the same day (October 21st, 1857), said Montgomery and Lund executed another bill of sale to said Steam Saw Mill and Machine Company, for consideration of \$15,000, "of all the steam saw mills, steam engines, boilers, machinery, and stock of all kinds, manufacturing or in process of manufacturing, appertaining to and belonging to the engine and machine manufacturing department of the business heretofore conducted under the name of Messrs. Montgomery & Co., together with all the belongings thereto," &c.

Montgomery became the president of this machine company on its organization, and always continued such president, and had the management and direction of its business.

Montgomery & Co. had a lease of the factory premises for five years from May 1st, 1855, which passed to the machine company under the bill of sale first above mentioned.

On the 23d day of December, 1858, an agreement was entered into between Montgomery and certain others of the stockholders of the said machine company, by which said Montgomery was to become possessed of their stock on certain conditions, which, it is claimed, were never performed by Montgomery.

Montgomery, the 29th day of November, 1859, executed

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a general assignment for the benefit of his individual creditors, to Robert Grant, of "all the estate and property, real and personal, of him, the said William Montgomery, either individually, or as a member of the late firm of Montgomery & Co., or a corporator or stockholder of the New York Steam Saw Mill and Machine Company."

Under this assignment Grant claimed title to the property in question. And as the defendant as sheriff had in the first instance levied upon said property under the said execution of Booth against Montgomery and Garabrant, this action of replevin was brought by Grant.

On the first trial the jury found that the stock and materials belonged to Robert Grant, valuing the same at \$13, 233 81; and that the tools and fixtures belonged to the steam saw mill and machine company, valuing the same at \$13,188; and judgment has been ordered in conformity with such findings, and has been affirmed by the general term of the second district. Robert Grant died September 28th, 1861.

R. W. VAN PELT *for the appellant.*

W. R. STAFFORD *for the respondent.*

PARKER, J.—I think there was no abatement of the action by the death of Grant, the original plaintiff. The cause of action survived by virtue of the statute (2 R. S., 447, § 1, 1st ed.; *Webbers' Exrs.* agt. *Underhill*, 19 *Wend.*, 449); and this being so section 121 of the Code, saves the action from abatement.

Although Grant held the property in question as a trustee, on his death it passed under the common law to his personal representatives, who were bound to execute the trust (*De Peyster* agt. *Ferrers*, 11 *Paige*, 13). We held, in the case of *Baum's Ex.* agt. *Vaughn*, decided at the last term of this court, that, section 68 of the article of the Revised Statutes, relative to uses and trusts (1 R. S., 730, 1st ed.)

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does not relate to personal property, and that the common law rule above referred to still exists, and applies in reference to such property.

The consequence is, that on the death of Grant the title to the property passed to his legal representatives, who, unless they had transferred it to Emerson, should have been substituted. But the appointment by the court of Emerson to execute the trusts of the assignment, and his substitution as plaintiff in the action, having both been made by the express consent and stipulation of the defendant, set forth in the case, I am inclined to think, his motion for dismissal of the complaint, upon the trial, on the ground, that the title to the property was in the personal representatives of Grant, was properly denied. *Non constat*, that the cause of action had not passed, by assignment, from the personal representatives of Grant to Emerson. In that case, he was the proper person to be substituted, and, I think, as against the defendant under his stipulations, such assignment should be presumed.

The question of the grounds on which the nonsuit was claimed, to wit, that Grant was not the owner of the property when the suit was brought, and that it was incompetent for Montgomery to make any transfer to himself, were also properly regarded as not well taken, the first as involving a question of fact for the jury, and the other as not covering the whole of the plaintiff's claim.

The objection to the introduction of Grant's testimony on the former trial was properly overruled. It was but the common case of reproducing the testimony, of a deceased witness. I see nothing in the objection that he was a party. He was also a witness, and, therefore, within the rule allowing proof of what he testified to be given.

The inquiry of the witness, Montgomery, whether he received any directions from Grant in regard to the property, immediately after the delivery of the assignment, was relevant and proper as part of the *res gestæ*.

The question to the same witness, as to what was done

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with moneys which, he had stated, were realized from a portion of the assigned property, was also properly allowed.

I see no error in the rulings in regard to the questions put to the witness, Lund, as to his delivery, when he left, of the stock, &c., at the machine shop, to Montgomery, and as to his ever again exercising any acts of ownership over the property. This was clearly pertinent to the question which was litigated, whether Montgomery owned the property or any part of it.

The offer of the defendant to prove, that the sheriff of Westchester, levied upon the property in question as the property of the Steam Saw-Mill and Machine Company, after this suit was brought, was wholly irrelevant and immaterial, and was properly excluded.

The court was requested to charge, "that if the sheriff (defendant) was found in the actual possession of the property levied on under the Booth execution, the plaintiff must prove a demand of said property, and refusal to surrender it before he can recover," which was refused.

If the property belonged to the plaintiff, the taking it out of the possession of Montgomery, who was the plaintiff's agent, using it in the plaintiff's business, in hostility to the plaintiff's right to it, was a wrongful taking as against the plaintiff; (*Clark* agt. *Skinner*, 20 *J. R.*, 465), and no demand was necessary; (*Cummings* agt. *Vorce*, 3 *Hill.*, 282; *Dunham* agt. *Wyckhoff*, 3 *Wend.*, 280). The request was, therefore, properly refused.

As to the defendant's request, to charge that Montgomery, while acting as president of the machine company, could not become the purchaser of its property, if objected to by any stockholders or creditors of the company, there was nothing in the evidence calling for such instruction to the jury, nor for anything more on that subject than the court had already said to them; for they had been already instructed that, as to all that portion of the property in question, which had been transferred to the machine company, and which had been acquired by said company, the

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title to it remained in the company, at the time of the assignment, and did not pass to Grant, and that Montgomery's interest in such property, at the time of the assignment, was a stockholder's interest only, and that only such interest passed by the assignment, so that the additional instruction requested was entirely uncalled for.

The complaint now made by the plaintiff's counsel, that, under the charge of the court, it was the duty of the jury to render a verdict for the defendant, as to all the property in question, and that the court below should, on that ground, have set aside the verdict, is not one which this court can listen to or consider. The case is not open to us for an examination of the facts.

The finding by the jury that Grant was the owner of that portion of the property in question, described as *stock and material*, and not of that described as *tools and fixtures*, rendered necessary a more specific description of the two classes. This the court ordered to be made by directing the complaint to be amended, so as to conform to the evidence, and to designate the portion of the property found for the plaintiff described as stock and material, and the portion found for the defendant described as tools and fixtures, to which the counsel for the defendant excepted. And thereupon, the plaintiff did amend the complaint by inserting at the end of the list of articles a list of those which he denominated *tools and fixtures*, and stated that the residue of said property was known as stock and material. No fault was found with the manner in which the distributing was made, and the amendment carried out.

I think it was competent for the court to amend the verdict, as was in effect done for the purpose, not of adding or subtracting, but of specifying in accordance with the evidence, as was done in this case. (*Sleight agt. Hartshorne*, 1 *J. R.*, 149; 1 *Sel. Pr.*, 480; *Archbold*, *Pr.* vol. 1, 215, vol. 2, 275).

Upon the whole case, I am of the opinion, that the judgment should be affirmed. Affirmed.

DIGEST

OF

ALL THE DECISIONS

CONTAINED IN THE FOLLOWING REPORTS:

41 *Howard Pr. R.*; 43 *N. Y.*; 57 and 58 *Barbour's R.*;
and 2 *Lansing's R.*

A.

ABANDONMENT.

See INSURANCE, (MARINE,) 58 *Barb.*

ACCIDENT INSURANCE.

1. A railway passenger assurance policy, issued by the defendant, insured the holder (plaintiff's intestate), in the sum of \$5,000, in the event of her death from personal injury, "when caused by any accident while traveling by public or private conveyances provided for the transportation of passengers." In the course of a journey by connecting steamboat and railway line, she fell upon a slippery sidewalk, while walking from the steamboat landing to the railway station, as was usual for travelers on that route, and thereby received injuries which caused her death:

Held, it appearing that she was so walking in the actual prosecution of her journey, that the death was covered by the terms of the policy, and that she was to be regarded as having re-

ceived the injury while traveling by public conveyance. (*Northrup agt. Railway Passenger Ass. Co.* 43 *N. Y.* 516.)

2. *It seems*, that the fact that there were hacks by which the plaintiff's intestate might have ridden from the landing to the station, did not affect the question, it being the general custom for the passengers to walk. *Id.*

ACCORD AND SATISFACTION.

See BOARD OF SUPERVISORS, 58 *Barb.*

ACCOUNTING.

See EXECUTORS AND ADMINISTRATORS.
(2 *Lansing*)
SURROGATE. (*Id.*)

ACCOUNT STATED.

1. One of the two copartners advanced moneys for the firm business in excess of the amount which he had agreed to furnish therefor, and charged interest thereon upon the firm books, which, after dissolution, the firm clerk, acting for such partner and in connection

Digest.

with the other partner examined, and no objection was made by the latter to the charge; statements of the accounts were also presented to the latter partner, including the charge for interest, and he then made no objection; it an action by the partner who had made the advances, for an accounting, the referee allowed the item of interest as upon an account stated:

Held, on appeal, that this decision should be sustained. (*Lloyd agt. Carrier*, 2 *Lansing*, 365)

ACCOUNT.

1. A complaint stated that the plaintiff and defendant, being copartners in business, dissolved copartnership, on a day specified, when it was agreed that an inventory should be taken of the assets of the firm, including the notes and accounts due to it, and that the defendant should pay the plaintiff one half of the amount of the inventory deducting one half the liabilities of the firm, which the defendant assumed to pay; that such inventory was taken; the precise amount due to the plaintiff ascertained and agreed upon; and the defendant went into and remained in possession. The prayer was for an account of the partnership dealings, and that the plaintiff have judgment for the balance which should be found due him, on such accounting.

Held that the complaint was clearly in an action at law; and the demand for an accounting was merely nugatory, it being not only wholly unsupported by any allegations in the complaint, but inconsistent with the case made by the complaint, which asserted that the account was adjusted, the amount liquidated, and the balance agreed to be paid. (*Short agt. Barry*, 58 *Barb.* 177)

Held, also, that although it appeared from the findings of the referee that an account was necessary to settle the equities between the parties, and an action might be maintained for that purpose, if the defendant should refuse to render such account, or to pay the balance; yet that such was not the cause of action set up in the complaint, which was assumpsit, at law, and not an action of purely equitable cognizance. And that the referee erred in proceeding to take an account. (*Id.*)

ACCUMULATIONS.

1. An accumulation for the benefit of an unborn child, to commence after his

birth and to terminate with his minority, is lawful, provided, in case of real estate, that the accumulation also commences within the time permitted for the vesting of future estates; and in case of personal property that it commences within the time allowed for the suspension of absolute ownership. (*Manice agt. Manice*, 42 *N. Y.*, 303).

2. If the estate limited to the infant is contingent, an accumulation of the income during his minority cannot be said to be for his benefit. (*Id.*)

3. But a devise of lands to an infant when he shall become of age, with remainder over, if he die under age, creates a vested estate in the infant, defeasible by condition subsequent, and this is a sufficient title to sustain an accumulation during the minority of such infant, as being for his benefit. (*Id.*)

4. A remainder in fee in real estate, to take effect after the expiration of two lives in being, was created in favor of a person not in being at that time; and a further contingent remainder in favor of a person not in being at the creation of the estate, was limited to take effect in the event that the person to whom the remainder was first limited should die under the age of twenty-one years:

Held, that a trust to accumulate the rents and profits during the minority of the first of such remainder-men in fee, and for his benefit, is valid. (*Id.*)

See WILLS. (*Id.*)

ACTION.

1. Where an illegal contract has been fully executed, and money paid thereunder remains in the hands of a mere depository, who holds the money for the use of one of the parties to the contract, an action brought to recover the money so held will be sustained (*Woodworth agt. Bennett*, 43 *N. Y.*, 273.)

2. A third person, who receives money from one party to be paid to another (which payment could not have been enforced between the two parties, on account of the illegality of the transaction between them), cannot interpose such illegality as a defence to an action brought against him to enforce payment. (*Id.*)

3. Where, however, the recovery of the money requires the enforcement by the court of any of the unexecuted

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provisions of the illegal contract, no action can be maintained. (*Id.*)

4. The fact that the state is not subject to an action on behalf of a citizen does not establish that he has no claim against the state, or that no liability exists from the state to him; but only that there is no proper tribunal to try the claim, and no remedy. (*Coster agt. Mayor of Albany* 43 N. Y., 399.)

5. If one person makes a contract, whether with or without seal, with another for the benefit of a third person, such third person may maintain an action on the agreement. (*Id.*)

6. A person, either members of, or friendly to a Sunday-school connected with the plaintiff, a religious corporation entitled to avail itself of the provisions of chapter 122, of the laws of 1850, as amended by chapter 235, of the laws of 1860, authorizing religious corporations to increase the facilities of public worship, signed a subscription for money to be appropriated to the erection of a building for Sunday-school purposes of the said church, which subscription paper was entitled as "subscriptions and donations of the Sunday-school building fund" of said church. Donors were notified that receipts would be given them by the finance committee of the plaintiff. The subscriptions were by the signers paid over to the defendant, who was, at the time, treasurer of the plaintiff, and subsequently, he having ceased to be treasurer, and refused to pay over or account for the amount of such subscriptions paid in:

Held, that these circumstances gave to the plaintiff sufficient title to recover the same of the defendant (*Rector, &c., of the Church of the Redeemer agt. Crawford*, 43 N. Y., 476.)

7. And this although the original contributors had, some of them, directed the defendant not to pay over their subscriptions, and the Sunday-school had a voluntary organization independent of the church. (*Id.*)

8. The defendant, and one B., being the owners of a certain flour mill, and manufacturers (as partners) of flour therein, becoming embarrassed, the plaintiff advanced to them certain sums, and agreed to indorse their business paper to a certain amount, upon the arrangement that he was to be secured by mortgage upon the mill, and the assignment of a certain policy of insurance thereon, and to receive one-third of the profits of the business,

sharing in one-third of the losses. The assignment was given (on its face as security merely) to the plaintiff, and various indorsements made by him. Subsequently the firm of B. and the defendant having failed, the plaintiff took a lease of the mill from them, agreeing to operate it, and retain one third of the profits, and apply the other two-thirds to the payment of the debts for which he was liable as "indorser, acceptor and security." The mill, while being operated under this agreement, was burned. The plaintiff sent to the defendant (residing near the office of the company) the policy, the assignment, and his own receipt to the company for the money, requesting him to collect the amount. The defendant having presented these papers to the underwriters and delivered them up, together with a receipt in the name of himself and B., obtained the money and refused to remit it to the plaintiff:

Held, that he must be regarded as having received it as agent of the plaintiff, and was bound to pay it over to him, without regard to the estate of the partnership accounts between the plaintiff, the defendant and B.; or to the amount, actually outstanding of the liabilities, as security for which the policy was assigned, as long as any part of such liabilities remained unpaid. (*Howard agt. France*, 43 N. Y., 593.)

See BILLS OF EXCHANGE. (*Id.*)

CAUSE OF ACTION. (*Id.*)

COUNTERCLAIM. (*Id.*)

FORECLOSURE. (*Id.*)

MISTAKE OF FACT. (*Id.*)

NEGLIGENCE. (*Id.*)

PARTNERSHIP. (*Id.*)

PLACE OF TRIAL. (*Id.*)

PUBLIC POLICY. (*Id.*)

SHERIFF. (*Id.*)

STATUTE OF FRAUDS. (*Id.*)

TAXES. (*Id.*)

TENANCY AT WILL. (*Id.*)

VENDOR AND VENDEE. (*Id.*)

AGREEMENT. (57 Barb.)

FRAUD. (*Id.*)

HUSBAND AND WIFE. (*Id.*)

JUSTICE OF THE PEACE. (*Id.*)

PARTNERSHIP. (*Id.*)

RAILROAD COMPANIES. (*Id.*)

SHERIFF. (*Id.*)

9. An action at law for goods sold and delivered, cannot be changed into an action in equity for an account between the parties. (*Short agt. Barry*, 58 Barb. 177.)

10. Where the facts stated in a complaint constitute a cause of action for the recovery of damages for false and fraud-

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ulent representations made by the defendant in negotiating the sale and transfer of a bond and mortgage in payment for land purchased, and the prayer for relief is a demand of judgment for damages in a specified amount, the action must be held to be, and treated as, an action at law to recover the damages sustained by reason of the fraud. (*Graves* agt. *Spier*, 58 *Barb.* 349.)

11. And this, notwithstanding there is also a prayer for relief in the alternative—"or that the defendant be adjudged to reconvey the premises," to account for the use, income and profits thereof, or for other relief; where no cause of action which could entitle the plaintiff to the alternative relief is stated in the complaint. (*Id.*)

12. A cause of action for fraud in the purchase and sale of real estate survives, to and against the personal representatives of a deceased party to the transaction, and is therefore assignable, so that the assignee may maintain an action upon it. (*Id.*)

See COMPLINT. (*Id.*)

DECEIT. (*Id.*)

JUSTICE OF THE PEACE. (*Id.*)

MARRIED WOMEN. (*dd.*)

PROMISSORY NOTES. (*Id.*)

WATER. (*Id.*)

13. An action upon a judgment against defendants therein, entered in form against them jointly, is presumptively an action against joint debtors. (*Stahl* agt. *Stahl*, 2 *Lansing*, 60.)

See BILLS OF EXCHANGE. (*Id.*)

CORPORATION. (*Id.*)

COMMON CARRIER. (*Id.*)

DEFENCES. (*Id.*)

ELECTION OF ACTIONS. (*Id.*)

JOINT AND SEVERAL DEBTORS. (*Id.*)

OFFER TO COMPROMISE. (*Id.*)

OWNERSHIP IN COMMON WITH CHATTELS. (*Id.*)

PAUPER. (*Id.*)

PLEADINGS. (*Id.*)

POLICY OF INSURANCE. (*Id.*)

PRACTICE. (*Id.*)

STATUTE OF FRAUDS. (*Id.*)

VENDOR AND PURCHASER OF LAND. (*Id.*)

VENDOR AND PURCHASER OF CHATTELS. (*Id.*)

ACT OF BANKRUPTCY.

- I. W. gave to S. W., his father, a mortgage on land of \$2,000, as security to that extent, against a like mortgage of \$5,000, given by the latter for a loan

to W., and having paid the greater part of the latter mortgage, and being insolvent procured an assignment of the \$2,000 mortgage from S. W., to C., who knew of his insolvency, for the purpose of preferring a debt. Within four months after the assignment, W.'s creditors filed a petition against him in bankruptcy; C. foreclosed, purchased at the sale, and conveyed to a *bona fide* purchaser for full consideration. In an action by W.'s assignee in bankruptcy, duly appointed (who had not been made a party to the foreclosure), against C., to recover the purchase money received by him from his grantee:

Held, that the assignment of the \$2,000 mortgage, as to such part of the amount secured thereby, as remained unpaid of the \$5,000 mortgage was valid, but that beyond such amount, the said assignment was void under the provisions of section thirty-five of the bankrupt law; and that the plaintiff might ratify the conveyance of C., and recover the purchase money which he received thereon, less such part of the \$2,000 mortgage, as was necessary to satisfy the balance unpaid on the principal mortgage. (*Winslow* agt. *Clark*, 2 *Lansing*, 377.)

2. The evidence showing that no more than \$500 was due on the mortgage of \$5,000, and the appeal being from a judgment on a referee's report dismissing the complaint, the plaintiff, was allowed to have judgment for the balance of the purchase money paid to the defendant, without costs, upon stipulating to allow a deduction of \$500 therefrom, otherwise the judgment to be affirmed with costs. (*Id.*)

ACTION FOR CAUSING DEATH.

See CONTRIBUTORY NEGLIGENCE. (43 *N. Y.*)

MASTER AND SERVANT. (*Id.*)

ADIRONDACK COMPANY.

The Adirondack Company has no power or authority, under its articles of association to construct a railroad through the county of St. Lawrence; and although the statutes have given the company the right to obtain such power, upon its compliance with certain specified conditions, yet, until it has availed itself of the privilege so conferred, a city in that county has no right to issue its bonds to aid in the construction of a railroad, by such company, through the county *The People*

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ex rel. Averill agt. The Adirondack Company, (57 Barb. 656)

See MUNICIPAL CORPORATIONS.

ADMIRALTY JURISDICTION.

1. Any state legislation providing for the enforcement of a maritime claim or contract, except by common law remedy, infringes upon the exclusive jurisdiction of the federal courts, and is in violation of the federal constitution. (*Brookman agt. Hamill, 43 N. Y. 554.*)

2. But as to claims, not in their nature maritime, against the owners of vessels, the state jurisdiction is complete, and there is no restriction upon its power to prescribe forms and methods of proceedings to enforce them. (*Id.*)

3. It is not material to the question of constitutionality, in any particular case, whether the admiralty courts do or do not proceed in such case *in rem*, but the test is the nature of the claim, whether maritime or otherwise. (*Id.*)

4. Ships and vessels, when within the territorial jurisdiction of the states, are not exempt from the operation of their laws for the collection of claims, or the creation or enforcement of liens *not founded upon maritime contracts or torts*; but as to the latter, the jurisdiction of the admiralty is, except as to mere common law remedies, and with the reservation as to inland lakes and rivers contained in the act of congress of 1845, exclusive in all cases, as well where they proceed only *in personam* as *in rem*.

Held, accordingly, that claims for wharfage of a sea-going vessel are maritime in their nature, and the act of 1862, (chap. 482 of laws of 1862.) therefore, in so far as it provides for attachments and other proceedings *in rem* against vessels for such claims, is void; and a bond given to discharge such an attachment cannot be enforced. (*Id.*)

See CONSTITUTIONAL LAW. (*Id.*)

ADMISSIONS.

See CRIMINAL LAW, (57 Barb.)

ADVANCEMENTS.

See PARTITION, 58 Barb.

ADVERSE PARTY.

See APPEAL, 2 Lansing.

ADVERSE POSSESSION.

1. A party cannot, as against the true owner, be holding premises adversely, if his title does not cover the premises. He is, in such a case, a mere squatter or trespasser. (*Marble agt. McMin, 57 Barb. 610.*)

2. Although adverse possession is not affected by a bad or defective title; and although a claim under a defective title will be a good adverse possession; yet, there must be at least color of title. (*Id.*)

3. Where one is in possession without claim of right, before the date of his deed, such possession will be presumed to be the possession of the true owner. He can claim to be holding adversely, only after, or at the date of his deed. (*Id.*)

AGENT.

See PRINCIPAL AND AGENT. (2 Lansing.)

AGREEMENT.

See CONTRACT. (2 Lansing.)

1. A promise by a justice of the peace, who has by his own negligence and carelessness entered an erroneous judgment upon his docket, in favor of the defendant instead of the plaintiff, that if the plaintiff will make a motion in the county court to set aside the erroneous judgment, or the execution issued thereon, he will pay all the damages growing out of his mistake, in case the execution shall not be set aside, is not against public policy, and an action will lie upon it. (*Christopher agt. VanLiew, 57 Barb. 17.*)

2. The plaintiff agreed to furnish to the defendants an engine, boilers, &c., to be of the best materials and subject to the approval of the defendants' engineer, and to guaranty that they should be in perfect running order. The engine, &c., were delivered, and notes given for the price, but on attempting to use the engine, one of the flues collapsed, so as to prevent any further use of it. The plaintiff, on being applied to by the defendants, promised to repair the flues, which he did, by putting in new ones, and the engine as repaired was, with the boilers, approved by the engineer, accepted by the defendants, and continued to be used by them.

Held that the defendants not having

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notified the plaintiff of their determination not to accept the engine, on discovering the defect, but having permitted him to make alterations, and continued to use the engine, afterward, this was to be deemed an acceptance of the same, and a waiver of any claim on account of the previous defect. *Cassidy agt. Le Fevre, 57 Barb. 313.*)

3. Accordingly held that for the delay caused by the substitution of new flues, the defendants were not entitled to recover damages. (*Id.*)
4. The plaintiff's testator, having an outstanding title to a farm, alienable to the defendant or any one else, an agreement of sale was made, between him and the defendant, by which the defendant was to pay, for such farm, \$5,000. He then paid thereon \$4,000, leaving \$1,000 unpaid, which he agreed to pay within a few days. There was no other writing, between the parties, than a deed of the premises, subscribed by the vendor and his wife and acknowledged, which, by the consent of the parties, was left with a third person, as an escrow, to be delivered to the defendant when he should pay the remaining \$1,000.

Held, 1. That the agreement was not void by the statute of frauds because not in writing and signed by the parties. That it was the agreement of the parties, in writing, and subscribed by the party by whom it was made. 2. That an averment of the defendant's agreement or promise to pay the balance of the purchase money was sufficient to sustain an action therefor, without any allegation of the absolute delivery of the deed, or demand of the balance of the consideration, upon such delivery and acceptance. 3. That the delivery of the deed as an escrow, was, under the circumstances, a sufficient delivery not only to avoid the statute of frauds, but to estop the defendant from availing himself of it as a defense. 4. That the agreement having been performed on the part of the vendor, but not performed on the part of the purchaser, an action at law would lie upon the express promise to pay the consideration, or upon a promise implied in law. *Caggar agt. Lansing 57 Barb. 421.*)

5. The plaintiff received from the plaintiff's assignors certain shares of stock, and executed an instrument acknowledging the receipt thereof, and further saying, therein, "which stock I am to do the best I can with, and have one half the proceeds."

Held 1. That there was not an absolute sale of one half of the stock to the defendant. 2. That the fair and reasonable construction of the agreement was, that the defendant was to receive the certificates, and within a reasonable time dispose of said stock upon the most advantageous terms which he could procure, and when that was accomplished, and the proceeds were realized, he was to receive one half thereof, as his compensation. 3. That the sale or other disposition of the stock, by the defendant, was a condition precedent to his acquiring any interest in such stock, or the proceeds thereof; and that the proceeds of the stock did not mean the stock itself. 4. That if the defendant had sold the stock, fairly, at whatever price he could obtain, he would have been entitled to retain one half of the proceeds of the sale; but that having retained the stock for more than ten years, without effecting a sale thereof, he was not entitled to retain one half of such stock as his own, but was bound to account to the plaintiff for said stock, together with the dividends he had received thereon. *HOGEBOM, J. dissented. (Wight agt. Wood, 57 Barb. 471.)*

See COMMISSIONERS OF HIGHWAYS.
PRINCIPAL AND AGENT.

6. In the case of indorsements of commercial paper, by accommodation indorsers, the law does not presume an agreement between the maker and indorser that the latter shall be compensated for the favor of his indorsement. If compensation is claimed, the indorser must show that there was a special agreement that he should be compensated for such use of his credit. (*Perrine agt. Hotchkiss, 58 Barb. 77.*)
 7. The law allows a party who becomes surety for another, by way of indorsement or otherwise, to agree upon a certain price for the use of his credit. But unless there is some specific contract fixing the price to be paid, a surety cannot recover for the use of his credit by the principal. (*Id.*)
 8. The defendants agreed to send to the plaintiffs, at San Francisco, "all the balance of iron for said railroad, now lying in Boston or New York, amounting to about fifteen hundred tons, which said iron was originally purchased by C. L. W. from W. F. W. & Co., of Boston:
- Held*, that the language was simply descriptive, and did not constitute a warranty that the particular article ex-

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isted. And that if the article was not at the places from which the defendants were to transport it, the omission to send it would be no breach on their part. (*Robinson agt. Flint*, 58 Barb. 100.)

9. The contracts of a county clerk, in the name of the county for printing necessary and proper to enable him to perform the duties of his office, are binding upon the county. *The People ex rel. Kinney agt. The Board of Supervisors of Courtland County*, 58 Barb., 139.)

10. And an individual having been employed by a county clerk or surrogate to do his printing at an agreed price, such employment being within the scope of the clerk's or surrogate's authority, and the sum agreed to be paid being no more than a reasonable compensation for the services, the board of supervisors are not at liberty to interfere with such contract, but should cause to be levied and paid the amount due thereon. (*Id.*)

11. Where the minds of the parties to a contract do not meet upon the whole and exact terms of such contract, the same is void. (*Fullerton agt. Dalton*, 58 Barb., 236.)

12. An article designated in a contract as "slops for their distillery," does not constitute a manufactured article, within the meaning of the rule which implies a warranty of merchantable quality. (*Holden agt. Clancy*, 58 Barb. 590.)

13. Nor is an agreement, by lessors of a cattle barn to furnish the lessees, at said barn, slops from the distillery of the former, to a specified sum per day, during the term, an agreement to manufacture or furnish a manufactured article, in the sense of the rule referred to. (*Id.*)

14. Although the residum, or refuse, of various kinds of manufactories is more or less valuable for certain purposes, and may be the subject of sale, yet the quality of such refuse matter is wholly subordinate to the process which is the main object of the manufacture; and it is not expected that his skill and attention will be devoted to it. (*Id.*)

See COUNTY CLERK. (*Id.*)
PROMISSORY NOTES. (*Id.*)
SET-OFF. (*Id.*)
STOCK. (*Id.*)

ALBANY.

See EMINENT DOMAIN. (43 N. Y.)

ALIMONY.

See CONTEMPTS, 1-10.

AMENDMENT.

1. Since the Code, the power of amendment given by section 173, is always exercised liberally; and although a complaint may be defective, yet if the court can see that there has been no surprise, and the parties have been fairly apprised of the questions sought to be litigated, substantial justice will be best promoted by trying the cause upon the merits, and giving a judgment upon the testimony, and according to the profits. (*Miller agt. White*, 57 Barb. 504.)

2. A plaintiff may properly be allowed to amend his complaint, upon the trial, by enlarging his claim for damages. (*Johnson agt. Brown*, 57 Barb. 118.)

3. That is clearly a matter resting in the discretion of the justice, at the trial, and no exception will lie to the exercise of such discretion. (*Id.*)

See COMPLAINT. (58 Barb.)

ANSWER.

See PROMISSORY NOTES. (57 Barb.)

APPEAL.

1. No appeal lies from an order denying a motion to compel a party to make his pleading more definite and certain, and to strike out irrelevant and redundant matter contained therein. (*Field agt. Stewart*, ante, 95.)

2. An order of the special term, denying a motion to strike out certain allegations of the complaint as irrelevant, is not appealable to the general term. (*Hughes agt. Mercantile Mut. Ins. Co.*, ante, 253.)

3. An order of the special term prescribing the terms upon which a lease of certain real and personal property was directed to be executed, is appealable to the general term. (*Matter of Duff*, ante, 350.)

4. The general terms were designed, not only, for the redress of legal errors occurring at the special terms, and before referees, but those of fact likewise. Hence, a review of the facts may be had before the general term, upon an appeal taken from the judgment and orders of the former courts. (*Id.*)

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5. They were also designed to redress wrongs arising from an erroneous, arbitrary, or otherwise improper exercise of discretion by the former. Hence, the definition of a *substantial right* as used in the 349th section of the Code in providing for appeals from the special to the general term of the supreme court, in the case *the People* agt. *N. Y. Central R. R. Co.*, (29 *N. Y.*, 418). (*Id.*)
 6. An application for leave to vacate a judgment and to answer the complaint, is addressed to the discretion of the court below, and whether granted or refused is not the subject of an appeal to this court. (*Birdsall* agt. *Birdsall*, ante, 389.)
 7. The fact that the court, at special term, granted the relief asked for, and the court at general term reversed the order made at special term, does not bring the order within the class of orders reviewable in this court. (*Id.*)
 8. The record upon such an appeal, in both courts, properly consists of the papers upon which the court acted in deciding and making the original order; the case then made is that which is to be reviewed, and the fact of an alleged waiver or abandonment of the appeal which depends upon acts *dehors* the record, can only be brought to the attention of the court on affidavits, and on a motion to dismiss the appeal or for relief against it. And such an application must be made and finally decided by the supreme court. (*Id.*)
 9. So an objection taken by the appellant, that the appeal in the supreme court was not heard in the proper district, or by a general term which should have heard it. This is a question affecting the regularity of the proceedings in the court below, and a question of practice. (*Id.*)
 10. An appeal lies to this court from an order of the General Term of the Supreme Court, affirming an order of the Special Term, in proceedings to acquire lands, involving the question of the right to condemn such lands under the statute. (*Renss. and Sar. R. Co.*, agt. *Davis*. 43 *N. Y.*, 137.)
 11. Where in an action upon a contract, it appears from the facts stated in the case, that the obligation was void, having been given to a public officer in a void proceeding, a judgment for the plaintiff will be reversed by this court, though no exceptions on those grounds were taken by the defendant on the trial. (*Brookman* agt. *Hamill*, *Id.* 554.)
- See FINDINGS OF FACT AND CONCLUSIONS OF LAW.
12. Whether respondents in an appeal by an executor and legatee from a decree of the surrogate, admitting a will to probate, will not waive the right to object to the executor's ability to appeal, by their default in not answering, and in allowing an order to be entered that the appeal be heard *ex parte*? *Quære.* (*Pruyn* agt. *Brinkerhoff*, 57 *Barb.* 176.)
 13. An order denying a motion to strike out a pleading as frivolous cannot be reviewed on appeal. (*The Joseph Dixon Crucible Co.*, agt. *The New York City Steel Works*, 57 *Barb.* 447.)
 14. It is not a substantial right to have it stricken out. On the contrary, it is a matter of discretion with the judge whether it shall so be stricken out or not. (*Id.*)
 15. If a judge improperly holds a pleading to be frivolous, the order is appealable, because the party putting in the pleading loses a right to such a pleading; but the reverse is not true. No right is lost and the party objecting to its sufficiency may have it set aside, on demurrer. (*Id.*)
 16. It seems an appeal lies to the general term from an order of the special term in the nature of an interlocutory decree directing a receiver in the action to surrender the property in his possession to another receiver or to a party to the action. (*The People* agt. *The Albany and Sarquehanna Railroad Co.*, 57 *Barb.* 204.)
- See PRACTICE. (*Id.*)
17. Where an order is made by a county court, upon a motion in an action pending in that court, an appeal to the supreme court from such order brings nothing into the appellate court, except the *motion* and *copies* of the papers on which it was founded. The *action* still remains pending in the county court, and no other court can render the judgment. (*Barker* agt. *Wing*, 58 *Barb.*, 73.)
 18. Thus where a verdict was rendered in favor of the plaintiff, in the county court, but before entry of judgment thereon, the defendant moved for a new trial in that court, which motion was granted, and then the plaintiff appealed to the supreme court, where the order granting a new trial was reversed, and a new trial denied, and judgment ordered on the verdict, with costs:

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Held, that such judgment was irregularly and improperly entered, in the supreme court; and the same was set aside. (*Id.*)

19. The Code has not changed the practice which formerly existed, on the subject of rendering judgments by courts of review. The "customary practice" still prevails, under rule 93 of the rules of practice. (*Id.*)

20. And as there never was any "customary practice" of entering judgments by the appellate court, in a case of that nature, such a judgment is without precedent or authority to sustain it. (*Id.*)

21. An order of reference, made at a special term, is not brought up by an appeal to the general term from the judgment entered in the action. Such order if erroneous, should be corrected by a direct appeal from it to the general term. (*Terry agt. McNiel*, 58 *Barb.* 241.)

22. Where a reference is by consent, and the action is tried without objection that it is not a referable action, no question can be raised; on appeal, in regard to the mode in which it was tried. (*Graves agt. Spier*, 58 *Barb.* 349.)

23. Although an appeal lies from an order for an allowance, yet when the allowance is granted at the trial, by the judge then presiding, who has seen and can best appreciate whether it is a difficult and extraordinary action, it must be a very glaring case of an excessive allowance which can justify interference with his discretion by an appellate tribunal. (*The Oneida National Bank of Utica agt. Stokes*, 58 *Barb.* 508.)

See REFEREE. (*Id.*)

24. Every party to an action, whether as plaintiff or defendant, who has an interest in sustaining a judgment or determination appealed from, is an "adverse party" within section 327 of the Code, and, as such, is entitled to notice of appeal. (*Hiscock agt. Phelps*, 2 *Lansing*, 106.)

25. The several members of a firm secured certain partnership debts and liabilities by two consecutive mortgages on real estate, which stood in their names, as tenants in common, and which had been purchased and was used by them for partnership purposes. Intermediate the making of these two mortgages, one of the partners executed a mortgage on his interest in the same premises, to secure an individual in-

debtedness contracted partly for the purpose of raising money to make up his share of the partnership capital, and partly for other purposes. The firm, as such, became insolvent; the partner executing the individual mortgage had not contributed his full share to the firm capital, and was personally insolvent; the other members had contributed their full share, and were personally solvent. The holder of the two first mentioned mortgages commenced a foreclosure, claiming for the second of them a priority over the individual mortgage, although the latter was prior in time. The solvent partners answered, and also claimed that the two mortgages, executed by all the partners, were entitled to be first satisfied, and that the individual mortgage was a lien on only one-fourth (the insolvent partner's interest) in the surplus. The insolvent did not appear but the holder of the mortgage, made by him, claimed that his mortgage was a valid lien as of the time of its execution, and judgment having gone against him, after a trial, he appealed, but did not give notice of appeal to the partners who had answered, and in substantial accordance with whose answer judgment had been entered.

Held, that the partners answering had an interest adverse to the appellant in sustaining the judgment, and were necessary parties to the appeal; that in case the judgment should be reversed, the parties not before the court would not be bound by the reversal, and the plaintiff's right might be prejudiced thereby, and he had, therefore, a right to take the objection; and that it was too late to make the other defendants parties, and the appeal should be dismissed. (*Id.*)

26. A notice of appeal from a judgment of a justice's court, which necessarily shows the respondent how the judgment should be more favorable to the appellant, and enables the former to make the offer permitted by section 371 of the Code, is sufficient, upon the question of costs, although it does not state, in *hac verba*, that the judgment should have been "more favorable." (*Fulfs agt. Wynn*, 2 *Lansing*, 153.)

27. By taking this appeal from the judgment of a justice of the peace in form as for a new trial, the appellant does not waive the right to insist that an attachment, through which the justice took cognizance of the case, was void. (*Stevens agt. Benton*, 2 *Lansing*, 156.)

28. Or to raise in the appellate court as fully as he might if he had appealed

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on questions of law only, all questions properly raised in the court below, excepting those to proceedings which took place on the trial of the action. (*Id.*)

29. On a trial upon appeal in the county court the jury gave a verdict for the plaintiff for \$284 37, upon which he entered judgment with costs in the aggregate for \$519 72. The complaint below demanded \$200, and it did not appear whether it had been amended, and no question was raised upon rendition of the verdict or otherwise in respect to the amount thereof. On appeal to this court the judgment was sustained. (*Channon* agt. *Lusk*, 2 *Lansing*, 211.)

30. The decision of a referee will not be reversed on appeal, upon the ground that it is given against a preponderance of testimony as respects the number of witnesses, where the evidence is conflicting, and no fact clearly ascertained, controls the case. (*Dauchey* agt. *Silliman*, 2 *Lansing*, 361.)

See ACT OF BANKRUPTCY. (*Id.*)
EXECUTORS AND ADMINISTRATORS. (*Id.*)
GENERAL TERM. (*Id.*)
SURROGATE. (*Id.*)
PRACTICE. (*Id.*)

APPEARANCE.

See DIVORCE. (58 *Barb.*)

APPRENTICE.

1. The authority of a mother to give a valid consent to the binding of her minor child as an apprentice or servant, where the father is dead, or not in legal capacity to give such consent, is not derived from the Revised Statutes, but existing previous to their enactment. (*People ex rel. Barbour* agt. *Gate*, 43 *N. Y.* 40.)

2. Her authority was, by the Revised Statutes, extended to cases of abandonment, or neglect to provide for his family by the father. (2 *R. S.*, 154, § 2.) And in those cases only, was the certificate of the fact by a justice of the peace of the town, indorsed on the indentures, requisite:

Held, accordingly, that where the father was dead, no certificate of the justice was necessary to render valid the mother's consent. (*Id.*)

3. The peculiar doctrines and practices of the Shaker communities are not recognized by the courts, as, *per se*, ground

for taking from them the custody of infants bound to them under the forms of law, and with the consent of the proper authorities. (*Id.*)

APPROPRIATION OF PAYMENTS

1. Where a payment is made upon general account, with no direction as to its application by the debtor, the law applies it to the oldest items. And where the account is composed of distinct "causes of account," and no direction is given by the debtor, the creditor may apply it, at the time, to that one of them he chooses, or if he make no application at the time, he may do so subsequently, it not prejudicial to the debtor. (*Sheppard* agt. *Steele*, 43 *N. Y.*, 52.)

ARREST.

1. A constable or an alderman, cannot, at common law, make an arrest without warrant, where there is no breach of the peace. (*Butolph* agt. *Blust*, ante, 481.)

2. Under the provisions of the charter of the city of Syracuse an alderman or policeman may arrest any person who may be found committing any violation of an ordinance of the city, without warrant—such as cruelly whipping a horse in a public street of the city. (*Id.*)

3. And a delay of half an hour in making the arrest, does not deprive the officers of the right to make it. Generally such time is not an unreasonable delay.

4. But such an arrest cannot be made by these officers outside the limits of the city of Syracuse; as where the person arrested, on seeing the approach of the officers stepped over the city limits into the town of Salina—the division line being near him. (*Id.*)

ARREST OF JUDGMENT.

1. A motion in arrest of judgment, after verdict, can only be properly based upon error appearing upon the face of the record, and which, after judgment, may be reviewed upon writ of error. It cannot be grounded upon any defect in evidence or improper conduct on trial. The decision of the court upon such motion, even if erroneous, is, itself, no ground of error, for the same objection can be raised upon writ of error, and after judgment the remedy by motion in arrest is gone, and the case is to be determined by the record,

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as if no such motion had been made. (*People* agt. *Allen*, 43 N. Y., 28.)

2. The ruling of the court upon motion in arrest is not the subject of exception, as, in criminal cases, only exceptions during the trial are allowed. (*Id.*)

ARSON.

1. On the trial of an indictment under (§ 4, 2 R. S., 667,) for setting fire in the night to a certain building, the property of an incorporated company, "erected for the manufacturing of woolen goods," it is proper to prove by the president of the company that the building fired was intended as a manufactory for such goods, though it was not at the time completed and used as such. (*McGuire* agt. *The People*, 2 Lansing, 227.)
2. And if the building was erected for such a manufactory, though not yet in fact appropriated to that purpose, there may be a conviction. (*Id.*)
3. Whether the erection has progressed sufficiently to constitute a building within the statute, is, it seems, a proper question for the jury. (*Id.*)
4. It seems that the statute distinguishes buildings of the latter class from those elsewhere mentioned in the section. (*Id.*)
5. A structure raised, roofed, inclosed on two sides, with its floors partly laid and window frames in without sashes: *Held*, to be a building "erected" within the intent of the statute. (*Id.*)

ASSAULT AND BATTERY.

1. One tenant in common has no right to oust or debar his co-tenants from joint possession with him; but if such co-tenants, after overcoming such attempt to oust them, and regaining possession, lay hands upon their co-tenant and remove him by force from the common property, they are liable for an assault and battery (*Wood* agt. *Phillips*, 43 N. Y. R., 152).

ASSESSORS AND ASSESSMENTS.

1. Assessors have no power or authority to make an assessment against an individual after they have completed their roll for review, or on the day fixed for review (*Clark* agt. *Norton*, 58 Barb., 434).

2. The defendants exercised the power devolved upon them as assessors in the months of May and June, 1868, and adjudged the plaintiff to be liable to assessment for that year in the sum of \$2,750, for real property only, and completed their roll, and gave notice of the time and place of reviewing the same.

Held, that with this act their power and authority to determine assessments for the current year was exhausted; and that they had no power afterwards to strike out the assessment against the plaintiff, for real estate, transfer such assessment to a purchaser of the property, and assess the plaintiff on the roll in the same amount for personal estate.

3. An assessment made after the expiration of the time during which assessors are empowered to determine what property shall be assessed, is made without authority, and void.

See NEW YORK, CITY OF (*Id.*)

ASSESSMENT OF DAMAGES.

1. The constitution. (art. 1, § 7,) provides that when private property shall be taken for public use, the compensation therefor, when not made by the state, shall be ascertained by a jury, or by not less than three commissioners, appointed by a court of record as shall be prescribed by law. (*Rochester Water-Works Co.* agt. *Wood*, ante, 53.)
2. The provision in the charter of the Rochester Water-Works Company, (*Laws* 1852, §§ 8-11,) which authorizes the court to increase or reduce the amount of damages reported by the three commissioners, for the taking of land for the use of said company, is unconstitutional and void. (*Id.*)
3. When the constitution requires damages to be assessed, either by a jury of twelve men, or by three commissioners, it does not require argument to demonstrate that it cannot be done by one, nor by three or more judges of this or any other court. (*Id.*)
4. It is competent to provide for an appeal to the court, in order to protect the parties against an imperfect appraisal; and upon that appeal the court can confirm or set aside the assessment, and correct irregularities committed by the commissioners or parties in the course of the proceedings; and this is the extent of the power possessed by the court. (*Id.*)
5. The general term, on appeal, has the

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power and it is its duty to make such an order as the special term should have made in such a case. (*Id.*)

6. In this case, the special term having reduced the amount of damages reported by the commissioners, the general term vacated that order, and remitted the case to the special term for the appointment of new commissioners to make the appraisal. (*Id.*)

ASSESSMENT FOR HIGHWAY LABOR.

See HIGHWAY. (2 *Lansing*.)

ASSESSMENTS.

1. An assessment [under the statute of 1846, as amended in 1858 (Laws of 1846, p. 466; Laws of 1858, p. 600), authorizing the assessment against persons entitled to receive rents reserved on leases in fee, or for lives, of the amount thereof, as personal estate], which is, in the aggregate, of all rents reserved by the various leases upon the whole of a certain patent of land, without specifying the amount reserved upon each lease, or any of the leases, and is assessed against "J. K., and other legal heirs of the late J. K., deceased, or their heirs or assigns," the J. K. first named being dead at the time of the assessment is void, and a sale for non-payment of a tax levied upon such assessment conveys no title to the purchaser (*Cruyer* agt. *Dougherty*, 43 N. Y., 107).
2. It is fatally defective in not complying with the original statute directing that the assessment should be "upon the person or persons entitled to receive the rents, in the same manner and to the same extent as any personal estate" (*Id.*).
3. It is also defective in not specifying "each rent assessed," as required by the amendment of 1858 (*Id.*).
4. The fact, that taxes levied upon assessments made in this manner in previous years, had been paid by the owners of the rent, creates no estoppel upon their objecting to the validity of the assessment in question (*Id.*).
5. Where the assessors have jurisdiction of the person and subject-matter for the purpose of an assessment of property for taxation, they act judicially; and while the assessment remains in force, no action will lie for the recovery of the tax so paid, although the property was not by law the subject of

taxation (Affirming 37 N. Y., 511); (*Bank of Commonwealth* agt. *Mayor of N. Y.*, 43 N. Y., 184).

6. Where certain property (rents accruing from perpetual leases) had in 1864 been in fact assessed, but to a person not the owner of the rents, and upon petition duly made to the assessors, the same property was put on the roll of 1865, and assessed to the true owner, and a tax levied upon it for 1864.

Held, that such reassessment was legal and valid (*Overing* agt. *Foot*, 43 N. Y., 290).

7. Where the assessors had opened their roll for inspection, in pursuance of notice given by them, and opposite the name of the plaintiff had left a blank which was to be filled up with a description of lands leased by him as soon as they could discover whether any had been released during the year, and where, after the roll was opened, the plaintiff's agent examined the same, and was informed of the assessors' intention, and he afterward furnished the assessors with a list of plaintiff's property, which was inserted in the roll about the middle of July.

Held, that the assessment was regular, and a tax levied thereunder was valid.

See TAXES (*Id.*).

8. Where an ordinance directs an avenue to be curbed and guttered, and sidewalks flagged, without requiring that new flagging shall be used, it is not a ground for setting aside the assessment, that the contractor under the direction of the street commissioner finding good flagging on a part of the line, resets it, only charging the expense of the labor. (*Matter of Anderson*, 57 Barb., 411).
9. Neither is it a ground for setting aside the assessment that the lots are charged for the work done opposite each lot, while the expenses are charged on all the property, per foot, equally. That is a matter within the discretion of the assessors, who are to make the assessment according to the amount of benefit each lot receives from the improvement (*Id.*).
10. Nor is the fact that more than one lot, owned by the same person, is included in one assessment instead of being separately assessed, any ground for vacating the assessment (*Id.*).
11. Although it would be better to assess each lot by itself, yet when the same

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person owns the whole, no injury can be sustained by putting them together.

12. A horse railway, constructed along and upon the grade of a highway, by laying rails of the ordinary dimensions upon pine stringers, fastened together with similar ties, together with the right (acquired partly by grant from adjoining owners, and partly by proceedings under the general railroad law, qualified by the public easement, to maintain and operate the road thereon, owned by a company chartered for fifty years, is assessable as real estate. (*People* agt. *Cassidy*, 2 *Lansing*, 394.)

ASSESSORS.

See ASSESSMENTS, MANDAMUS. (43 *N. Y.*)

ASSETS.

See EXECUTORS AND ADMINISTRATORS. (43 *N. Y.*)

ASSIGNEE.

See ACTION. (58 *Barb.*)
EVIDENCE. (*Id.*)
PARTIES. (*Id.*)

ASSIGNEE FOR BENEFIT OF CREDITORS.

1. Not a *bona fide* holder so as to cut off equitable set-off. (*Smith* agt. *Fulton*, 43 *N. Y.* 419.)

ASSIGNMENT OF MORTGAGE.

1. The assignment, of a mortgage given without bond, or other extrinsic written evidence of the debt secured, and containing no express covenant to pay, transfers to the assignee all the mortgagee's claim under the mortgage, viz.: His remedy against the land. (*Severance* agt. *Griffith*, 2 *Lansing*, 38.)

2. A complaint for foreclosure, set forth such a mortgage, expressed as security for payment of a sum of money in installments, and averred that it had been given to secure a part of the price of the mortgaged premises, and assigned to plaintiff:

Held, on demurrer, to show plaintiff to be owner of the mortgage debt. (*Id.*)

3. An assignment of a bond and mortgage, and "the moneys due and to grow due thereon," carries by its

terms a note for which they are held as collateral. (*Belden* agt. *Meeker*, 2 *Lansing*, 471.)

4. The debtor upon the security for a sum exceeding \$1000, may not impeach a transfer thereof on the ground that it was made for a moneyed corporation (1 *R. S.* 591, § 8.) by its president, without authority by previous resolution of the board of directors. (*Id.*)

5. Nor can he avail himself of an objection that such transfer was made by the president to pay an individual debt, and without consideration passing to the corporation. (*Id.*)

6. And, it seems, without proof to the contrary, due authority to the president will be presumed in favor of the transfer. (*Id.*)

See ACT OF BANKRUPTCY. (*Id.*)
RECORDING ACTS. (*Id.*)

ASSIGNMENT.

FOR BENEFIT OF CREDITORS. See
DEBTOR AND CREDITOR. (57 *Barb.*)
DEBTOR AND CREDITOR. (58 *Barb.*)
EVIDENCE. (*Id.*)
PARTIES. (*Id.*)

ASSUMPSIT.

See ACTION. (43 *N. Y.*)
BILLS OF EXCHANGE. (*Id.*)
MISTAKE OF FACT. (*Id.*)
PUBLIC POLICY. (*Id.*)
RELIGIOUS CORPORATION. (*Id.*)
VENDOR AND VENDEE. (*Id.*)

ATTACHMENT.

1. It is not necessary that the facts stated in an affidavit for an attachment under the act of 1831, should be decisive of a design on the part of the debtor to assign or dispose of his property with the intent to defraud his creditors. It is sufficient if they legally aim or tend to sustain that averment:

Held, that the facts and circumstances stated in this case, taken together, furnished, while uncontroverted, sufficient evidence upon the point of the defendant's fraudulent intent respecting the disposition of his property, to uphold the attachment. (*This, perhaps, may be considered a pretty close case on the question of a fraudulent intent in the disposition of property to cheat creditors.*—*REP.*) (*Cooney* agt. *Whitfield*, ante, 6.)

2. The defendant is a manufacturer and

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dealer in carriages. His store is on the corner of 10th street and Broadway in the city of New York; over his store is a furnished apartment in which he has his meals cooked and sleeps. This apartment he has occupied for years. About a year ago he hired a house in Litchfield, Connecticut, and moved his family into it, from this city. This place defendant calls his home, and goes to it every week:

Held, on motion to vacate an attachment against defendant, that he is a non-resident, and that the motion should be denied. (*Murphy* agt. *Baldwin*, ante, 270.)

See VESSELS. (43 N. Y.)

3. The issuing of an attachment is "the allowance of a provisional remedy," within the meaning of section 139 of the Code of Procedure; and if it be legally issued, all questions subsequent are questions of regularity, and not of jurisdiction. (*Gere* agt. *Gundlash*, 57 Barb. 13.)

See SHERIFF. (*Id.*)

APPEAL. (2 Lansing.)

NON-IMPRISONMENT. (*Id.*)

SURROGATE. (*Id.*)

ATTORNEY.

1. The purchase of the stock of a corporation, by an attorney, is not a violation of the statute prohibiting an attorney from purchasing any bond, thing in action, &c., with the intent and for the purpose of bringing a suit thereon. (*Ramsey* agt. *Gould*, 57 Barb. 399.)
2. The purchase of stock is not within the prohibition; it not being one of the securities or evidences of debt mentioned, nor a chose in action, within the meaning of the statute. (*Id.*)
3. The statute is a penal one, and cannot be extended to what is not expressly included in it. (*Id.*)

ATTORNEY-GENERAL.

1. The attorney-general has the power belonging to that officer at common law, and such additional powers as the legislature has conferred upon him. (*The People* agt. *Minor*, 2 Lansing, 396.)
2. But the only cases in which at common law he was authorized to interfere to restrain corporate actions, or was a necessary party to action for that purpose, were those in which the

act complained of, would produce a public nuisance or tend to the breach of a trust for charitable uses. (*Id.*)

3. The case of *Davis* agt. *The Mayor, &c.*, of *New York*, (2 Duer, 663,) commented on and explained, and certain dicta in that and in other cases disapproved, and the cases therein cited, examined. (*Id.*)

See PRACTICE. (*Id.*)

AWARD.

See INJUNCTION. (57 Barb.)

BAILMENT.

See BANKER AND BANK DEPOSITORS. (2 Lansing.)

BAILOR AND BAILEE.

1. A tradesman to whom raw materials are given to be converted into manufactured articles, (leather stock to be manufactured into shoes,) who contracts and receives them in good faith, is not guilty of embezzlement, by a subsequent wrongful conversion of the manufactured articles. (*People* agt. *Burr*, ante, 293.)
2. The employment of the tradesman, is an independent contract, and creates not the relation of master and servant, but that of bailor and bailee. (*Id.*)

BAGGAGE EXPRESS.

See CARRIERS. (43 N. Y.)

BANKRUPTCY.

1. An adjudication of bankruptcy terminates the interest of the bankrupt in any policy of insurance, and the policy is thenceforth void and of no effect; but an insurance company may consent to continue their liability by the usual transfer of the policy to the register in charge of the bankruptcy proceedings, until an assignee shall have been appointed, and may also transfer said policy to the assignee when appointed. It is optional with the company to continue the risk by such transfers, or to cancel the same. (*In re Carow*, ante, 112.)
2. The title to the property of a bankrupt, by operation of law, vests in the register as register, although the property may be in the possession of the U. S. marshal as messenger, it is still in the possession of the court, and the register is, by the bankrupt law, the court or trustee. (*Id.*)

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3. The U. S. marshal and assignee or trustee are officers of the court, and must obey the order of the register, and their necessary expenses and disbursements made by them in the protection of the property of the bankrupt's estate must be taxed by the register and paid out of the estate. (*Id.*)

4. A register has the right to allow amendments to the schedules on the *ex parte* application of the bankrupt, at any time while the cause is pending before him, but it is the better practice, if there shall have been an appearance on the part of the creditors, to issue an order to show cause, &c., and to require due notice of such application to be given. (*In re Heller, ante, 213.*)

5. That it is the duty of the bankrupt to amend his schedules so as to make them conform to the facts, and that the filing of specifications does not deprive him of that right or release him from that duty. (*Id.*)

6. That the register should allow all necessary and proper amendments whenever a proper cause therefor is shown. (*Id.*)

7. An involuntary bankrupt, who has complied with all the provisions of the bankrupt act, can apply for and receive a discharge the same as a voluntary bankrupt. The 33d section of the bankrupt act, as amended July 27th, 1868, and July 14th, 1870, is applicable to proceedings in involuntary bankruptcy. An insolvent, although having assets, and those assets having been duly surrendered to the assignee, but not amounting to the required fifty per cent. of the claims proven against his estate, is not entitled to a certificate of conformity, unless the bankrupt, before, on, or at the time of hearing of the application for discharge, tender or file the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, as required by § 33 of the bankrupt act as amended. In case an involuntary bankrupt does not tender or file the assent of his creditors, or show payment of his debts by the return of the assignee, or that his property and effects equal or will pay fifty per cent., so as to comply with the requirements of § 33 of the bankrupt act as amended, the certificate of conformity cannot be granted. (*In re Bunster, ante, 406.*)

See ACT OF BANKRUPTCY. (2 *Lansing.*)
INSOLVENT DEBTORS. (*Id.*)

BAR TO ACTION.

See FORECLOSURE. (43 *N. Y.*)
FORMER JUDGMENT. (*Id.*)

BEQUEST.

See DÉVISE AND BEQUEST. (2 *Lansing.*)

BILL OF LADING.

See CARRIERS (43 *N. Y.*).

1. On receipt of goods at New York destined to Chicago, but consigned to an immediate consignee at Buffalo, the carrier signed two bills of lading; one of them he retained, and it required delivery at Buffalo, named the charge for freight to that place, and directed the consignee to pay the shipper, or his order, specified advances made by him to the carrier; the other was identical with it, except in containing an additional memorandum of the charge for freight from New York to Chicago, and further consigning the goods to a Chicago consignee, and was sent by the shipper to the Buffalo consignee. The carrier delivered the goods to the consignee at Buffalo.

Held, that the latter became liable for the freight money earned on acceptance of the goods, and that the carrier could recover the same of him (*Dart agt. Ensign, 2 Lansing, 383.*)

BILL OF REVIVOR.

See SUPPLEMENTAL COMPL (43 *N. Y.*).

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where an accommodation note is made payable to two payees—one of whom indorses it, for the accommodation of the makers, upon the express agreement that the same should not be used unless the other payee also indorsed it—that the name of the other payee was then *forged* as indorser by one of the makers, who transferred the same to the plaintiff for value:

Held, in an action upon the note against the genuine indorser, that the plaintiff could not recover against him. (*Smith agt. Boyer, ante, 258.*)

2. The rule is well settled that a *forged* indorsement does not pass a title to commercial paper, negotiable only by indorsement. (*Id.*)

3. By the act of congress July 13, 1861,

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- recognizing a state of civil war between the United States government and certain states of the union, and the proclamation of the president, of August 16, 1861, all commercial intercourse between the citizens of the loyal states and the inhabitants of those states of the union declared to be in insurrection was interdicted and became unlawful. (*Woods* agt. *Wilder*, 43 N. Y., 164.)
4. This interdiction of intercourse involved a prohibition against every species of private contract with a subject or citizen of the enemy. (*Id.*)
5. A bill of exchange drawn 22d August 1861, by a citizen of the state of Georgia, upon his copartners in the city of New York, after the act of congress of July 13, 1861, and the proclamation of the president of August 16, 1861, made pursuant thereto, is an illegal and void contract, and cannot be enforced against such copartners. (*Id.*)
6. And this would be so, although the funds of a citizen would thereby be withdrawn from hostile territory. (*Id.*)
7. Where the payee of a draft, on the day of its receipt by him, and in banking hours, presents and surrenders it to the drawee, and receives therefor the drawee's check, which check, had it been presented to the bank on that day, would have been paid, and on the next day the check is presented to the bank for payment and payment refused, and the drawers of the draft at at once advised by letter of the non-payment of the check:
- Held*, that the check could be operative as payment only by express agreement; but that although, as between the said drawee and payee the payee was not bound to present the check until the day after its receipt by him, yet that between the drawers and payee of the draft, it was the duty of the payee to present the check at once, and he was guilty of laches in not so doing, and was chargeable with the consequent loss. (*Smith* agt. *Miller*, 43 N. Y., 172.)
8. Accordingly, where upon a sale of a bill of goods to the defendants, the plaintiff received from them for the price of a draft, which the plaintiff presented to the drawee, and took his check and gave up the draft, a delay of one day to present the check, during which time the drawee failed, was laches; and precluded the plaintiff from recovering the price of his goods from the defendants. (*Id.*)
9. A bill of exchange drawn in Canada on a business firm, in this state, payable in New York city in gold dollars, is a negotiable bill of exchange, and a judgment recovered on such bill should be for the amount of the bill and interest thereon in gold dollars, and with the costs in legal tender currency. (*Chrysler* agt. *Kenois*, 43 N. Y., 209.)
- See BONA FIDE HOLDER. (Id.)*
10. In an action upon a promissory note brought by one who has taken it for value, but after maturity the maker may defend, upon the ground that the note was given solely as protection against a mortgage executed and delivered to him by the payee to prevent a collection out of the mortgaged property of penalties incurred by the violation of law (*Merrick* agt. *Butler*, 2 *Lansing*, 103).
11. It is also a sufficient defense to the suit if, while the note was in the hands of the payee, the maker, without consideration, acknowledged satisfaction of the mortgage (*Id.*).
12. The payee and holder of an over due promissory note given for money loaned by him to the maker, purchased personal property from the latter, and surrendered the note as the consideration for the sale.
- Held*, that he was a *bona fide* purchaser, as against a prior mortgagee of the vendee, of whose mortgage he had no actual or constructive notice (*Powers* agt. *Freeman*, 2 *Lansing*, 127).
13. The decision in *Day* agt. *Saunders* (3 *Keyes*, 347), commented upon and explained, and held to be decisive in this case (*Id.*).
14. The defendant's testator while living delivered to the plaintiff, his sister, a sealed envelope, indorsed with directions not to open it until after his death, and to return it to him on request; this was upon his recovery from a dangerous illness, happening upon a visit to the plaintiff's house during which he had received from her extreme care and attention, and frequently told her that he would pay her well; the envelope was once returned to the testator at his request upon a subsequent visit, and redelivered to the plaintiff some two hours afterward. After the testator's decease, the plaintiff being previously ignorant of its contents, the envelope was found

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to contain his note to her for \$10,000, expressing the consideration to be for services rendered to him.

Held, that the plaintiff was entitled to recover the whole amount of the note *North agt. Case, 2 Lansing, 264*.

15. A promissory note payable to order was indorsed before maturity to a holder for value and without notice of any defense, by one assuming to act for the payee, but having no authority to make the indorsement; after commencement of an action thereon by the indorsee the payee ratified the indorsement.

Held, that the note was open to defenses existing between the original parties thereto (*Gilbert agt. Sharp, 2 Lansing, 412*).

16. And it seems that a ratification before suit, if made after maturity, would not relate back so as to cut off a defense on the merits (*Id.*).

17. In an action upon a negotiable promissory note, brought by a purchaser thereof before maturity, in good faith and for a valuable consideration, against the maker, the latter may prove as a defense that when he signed it, it was represented to him, and he believed it to be a contract entirely different in character (*Whitney agt. Snyder, 2 Lansing, 477*).

17. The case distinguished from that of a note fraudulently obtained, and which the maker intended to make (*Id.*).

See EVIDENCE (Id.).

JOINT AND SEVERAL DEBTORS. (*Id.*)
PREMIUM NOTE. (*Id.*)

BOARD OF SUPERVISORS.

1. To provide in advance for the official printing of the several county officers, is no part of the duty of a board of supervisors (*The People ex rel. Kinney agt. The Board of Supervisors of Cortland County, 58 Barb., 139*).

2. The board has no authority or power, except what is derived from the statute; and the statute does not authorize or empower them to contract, in advance, for such printing (*Id.*).

3. They have no power or authority to direct the clerk of the board whom he shall employ to do his official printing; or to direct, in advance, what price he shall pay, or agree to pay (*Id.*).

4. When a bill is presented, for services rendered to the county, the supervisors—unless the compensation for such

services be fixed by law, authority custom or binding contract—have to consider and pass upon the charges, and allow such sum as in their judgment is right and proper. In such cases, they have a discretion, which will not be interfered with by a mandamus directing how that discretion shall be exercised. (*Id.*)

5. If the statute prescribes the sum to be received for such services, the board are required to allow the bill according to such statute. They have no discretion over it. (*Id.*)

6. If the sum is fixed by a binding contract, the board are equally bound to allow the bill, in accordance therewith. (*Id.*)

7. The relator having done printing for the sheriff, at his request, but without any contract as to the price, such printing consisting of legal notices required by law to be published:

Held, that he was entitled to charge therefor the sum allowed by law; and that the board of supervisors should have allowed him that amount, without any deduction. (*Id.*)

8. When the statute allows an individual to collect, for a service rendered the county not more than a sum specified, he cannot be compelled to take less. (*Id.*)

9. When a newspaper is designated by a board of supervisors as one of the papers in which the session laws shall be published, in the absence of any contract with the proprietor, as to his compensation, he is entitled to the compensation prescribed by law; and the board of supervisors has no right to reduce the allowance to him below that amount. (*Id.*)

10. After a board of supervisors had passed upon an account presented by the relator, it caused to be made and delivered to him, an order on the treasurer, for the payment of the amount allowed. The relator refused to receive it in full of his claim, and notified the person handing it to him that he should at once commence a proceeding to compel the board to allow him the balance claimed. He subsequently tendered back the order to the same person, who refused to receive it. He afterwards received, and retained, the avails of the order:

Held, that the relator was not estopped, by this act, from disputing the correctness of the action of the board. And that the act of receiving the money on

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the order, and retaining it, was no accord and satisfaction, because the relator refused to receive it in full. (*Id.*)

BONA-FIDE HOLDER.

1. The holder of a bill of exchange received part payment of a debt, evidenced by notes past due, and secured by a mortgage held collateral thereto, and on receipt of which bill such past due notes are surrendered up and new ones given in their place, is a *bona fide* holder for value (*Chrysler* agt. *Renois*, 43 N. Y., 209).

See BURDEN OF PROOF (*Id.*).

See BILLS OF EXCHANGE AND PROMISSORY NOTES (2 *Lansing*).

BOND.

See CONTRACT, (43 N. Y.).
GUARANTY (*Id.*).

1. A bond will not be reformed by striking out portions alleged to be erroneous, where there is no evidence to show it was not drawn in exact conformity to the agreement previously made between the parties, but on the contrary, the complaint alleges that the bond was drawn according to such agreement, and it is clear that both obligor and obligee understood that the bond should contain the provisions sought to be stricken out (*Garnar* agt. *Bird*, 57 Barb., 277).
2. The fact that the obligor employed a lawyer, who gave him bad advice, and thereby deceived him as to his rights and induced him to execute the bond, furnishes no authority to the court to alter the contract of the parties (*Id.*).
3. The condition of a bond executed by a railroad company, to a city corporation, in consideration of the privilege of laying its tracks upon certain specified streets, was that the company should keep the pavement of such streets in thorough repair within the tracks, and three feet on each side thereof, &c., "under the direction of such competent authority as the common council may designate." In an action for a breach of such bond,
Held, 1. That it was immaterial whether or not the clause providing for a designation of competent authority was a condition precedent to the obligor's keeping the streets in repair. That it was a condition that could be waived; and if the acts of both parties were such that a waiver would have been inferred, as a matter of law, prior to

the alleged breach, it was not competent for the obligors, in an action for the breach, to set up the clause as a defense. 2. That the defendants had waived the clause requiring a designation, by entering upon, using and repairing the streets from the date of the bond to the day of trial; and that the plaintiff had waived it by permitting the defendants so to enter upon, use and repair the streets without making any designation. 3. That in such action the proper measure for damages was, the amount of a judgment recovered against the plaintiff, by an individual, for personal injuries sustained by him in consequence of the neglect of the obligors to keep a street in repair, and which judgment the city had been compelled to pay. 4. That the city corporation having notified the company to defend the suit brought against the city, and the company having failed to do so, the expenses of defending such suit were also a proper item in the recovery upon the bond (*The City of Brooklyn* agt. *Brooklyn City Railroad Co.*, 57 Barb., 497).

See ADIRONDACK COMPANY (*Id.*).
MUNICIPAL CORPORATIONS,
TOWNS (*Id.*).

POWER AND AUTHORITY (2 *Lansing*).

BOUNTY BROKERAGE.

See CONSPIRACY. (2 *Lansing*.)

BOUNTY TO VOLUNTEERS.

1. The act of 1864, (chap. 8, § 22.) giving the boards of supervisors of counties power to raise money for the payment of bounties of volunteers into the military and naval services of the United States, is not to be construed as retroactive; and such boards, therefore, have no authority to raise money for the payment of any sum by way of bounty, to persons who, previously to the passage of that act, had volunteered into the United States military or naval service. (*The People ex rel. Peake* agt. *Supervisors of Columbia County*, 43 N. Y., 130.)

BRIDGES.

See COMMISSIONERS OF HIGHWAYS. (57 Barb.)

BROKERS.

1. To entitle a real estate broker to re

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cover the usual commission, it must appear that his agency was, *in point of fact*, the procuring cause of the sale. Whether his agency did or did not have such effect, is a question of *fact*, to be determined upon the particular circumstances of each case. (*McClave* agt. *Paine*, ante, 140.)

2. After a defendant has introduced evidence to the effect that the purchaser's information was not derived from the broker, the latter is not entitled to have the jury instructed, substantially, that they might find a verdict in his favor solely upon proof of a bare introduction of the purchaser to the defendant. In such case the jury must further find upon the evidence that the broker, either by the introduction itself, or in some other manner, called or caused to be called, the attention of the purchaser to the property in question. (*Id.*)
3. Proof of a parol agreement between a plaintiff and a defendant to the effect "that, in case plaintiff would procure certain lands of the defendant to be sold, or would find a market for the same, at an aggregate price of not less than a certain sum named by the defendant, the defendant would sell the lands for said price and pay to the plaintiff for his services one half of the excess, which the plaintiff would procure to be given over and above the sum named by the defendant," followed up by further proof showing full performance on the part of the plaintiff at a price exceeding the limit named by the defendant and a subsequent refusal of the defendant to convey, is sufficient to entitle the plaintiff to recover his compensation, as agreed upon. (*Hague* agt. *O'Conner*, ante, 281.)
4. The compensation for brokerage in soliciting, driving or procuring the loan or forbearance of money being fixed by statute, it cannot be enlarged or changed, in a particular case, by any testimony. (*Perrine* agt. *Hotchkiss*, 58 *Barb.*, 77.)

See *STOCK*. (*Id.*)

BROOKLYN.

PARADE GROUND IN. See *MANDAMUS*. (58 *Barb.*)

BUILDING.

See *ARSON*. (2 *Lansing*.)

BURDEN OF PROOF.

1. It is a well established rule of law,

that one, claiming to have acquired title to the property of another under statutory proceedings, must show that every material provision, designated for the security and protection of owners, has been substantially complied with. (*Cruger* agt. *Dougherty*, 43 *N. Y.*, 107.)

2. The proof of exclusive possession by the prisoner, recently after the theft, of the whole or some part of the stolen property, is sufficient when standing alone, to throw upon him the burden of showing how he came by it, and if he fails to do so, warrants the jury in convicting him of larceny. And if the property was shown to have been taken by burglary or robbery, such possession unexplained is sufficient also to warrant a conviction of those crimes. (*Knickerbocker* agt. *People*, 43 *N. Y.*, 177.)
3. A party suing upon a negotiable note, purchased before maturity, is presumed in the first instance to be a *bona fide* holder; but when the maker has shown that this note was obtained from him under duress, or that he was defrauded of it, the plaintiff will then be required to show under what circumstances and for what value he became the holder. (*First National Bank* agt. *Green*, 43 *N. Y.*, 298.)
4. If the evidence as to the plaintiff's title is wholly uncontroverted, and so clearly establishes the plaintiff's title as a *bona fide* holder for value, that, even if the defendant could prove the defense of duress, there would be nothing to submit to the jury, then the defense is properly ruled out; but if otherwise, it should be received. (*Id.*)
5. Where the plaintiff, a bank, discounted a note for one of its customers and placed the amount to his credit, and there was conflicting evidence as to whether or not it was agreed that the amount should be kept on deposit by such customer until the note should be paid:

Held, that evidence offered by the maker to prove that the note was obtained from him by duress, was improperly rejected. (*Id.*)

BURGLARY.

1. The proof of exclusive possession by the prisoner, recently after the theft, of the whole or some part of the stolen property, is sufficient, when standing alone, to throw upon him the burden of showing how he came by it, and if he fails to do so, warrants the jury

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in convicting him of larceny. And if the property was shown to have been taken by burglary or robbery, such possession unexplained is sufficient also to warrant a conviction of those crimes. (*Knickerbocker agt. People*, 43 N. Y., 177.)

See CRIMINAL LAW. (57 Barb.)

BY-LAWS.

See CORPORATIONS. (43 N. Y.)

C.

CANAL APPRAISERS.

1. The return to a writ of certiorari brought from the determination of the canal appraisers under sections 16 and 17, of chapter 288, Laws 1840, presented no question of jurisdiction or of law as having been raised before or decided by the appraisers.

Held, that their determination should be affirmed (*People agt. Carrington*, 2 Lansing, 368).

2. The act contemplates the review of legal or constitutional questions only. Per INGALLS, J. (*Id.*).

CANAL REPAIRS.

See NEGLIGENCE (2 Lansing).

CANAL LOCK.

See NEGLIGENCE. (2 Lansing).

CARRIERS.

1. A clause in a bill of lading, given to the shipper of goods by a common carrier, exempting the carrier from liability for loss of the goods from certain causes, is binding upon the shipper as a special contract between the parties (*Steinweg agt. Erie Railway* (43 N. Y.)).
2. But where such clause releases the carrier "from damage or loss to any article from or by fire or explosion of any kind," it does not release him from liability for damage by those means resulting from his own negligence (*Id.*).
5. It is negligence in a carrier to omit to furnish for its vehicles and machinery for the transportation of goods, any improvement known to practical men, and which has actually been put into practical use; but a failure to take

every possible precaution which the highest scientific skill might suggest, or to adopt an untried machine or mode of construction, is not of itself negligence (*Id.*).

4. Accordingly, where goods having been shipped upon the defendant's railway under a bill of lading containing a clause releasing it from liability "for damage or loss to any article from or by fire or explosion of any kind," were destroyed by fire kindled by sparks from the locomotive hauling them.

Held, that such clause did not exempt the defendant from liability for loss by fire occasioned by the omission to apply to the locomotive any apparatus known and actually in use, which would prevent the emission of sparks; but, *held*, further, that the charge of the judge that, if the jury should find "that a locomotive could be so constructed as to prevent the emission of sparks, and thereby secure combustible matter from ignition, and the defendant neglected so to construct this locomotive, they should find for plaintiff, because there was a duty upon the defendant to use every precaution and adopt all contrivances known to science to protect the goods intrusted to it for transportation," was error, and not in accordance with the correct rule (*Id.*).

5. The common law liability of common carriers cannot be limited by a notice, though such notice be brought to the knowledge of the persons whose property they carry; but such liability may be limited by express contract (*Blossom agt. Dodd's Express*, 43 N. Y., 264).

6. But tokens given in exchange for baggage checks are not of such a nature as to put persons on their guard as to memoranda printed upon them, and persons receiving them are not presumed to know their contents, or to assent to them (*Id.*).

7. Accordingly, where a railroad passenger in a car dimly lighted at one end delivers his baggage check to an express messenger, and receives in return a card or receipt on which the number of the check is entered, and which also contains an agreement limiting the liability of the express company printed in much smaller type than the rest of the card, and so fine as to be illegible when the passenger is sitting.

Held, that the printed matter did not enter into or form a contract between the parties (*Id.*).

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See CONTRIBUTORY NEGLIGENCE (Id.).
RAILWAYS (Id.).

8. Where property committed to carriers consigned to a point beyond their route, was safely transported by them to the termination of their route, and there delivered to the keeper of a storehouse or warehouse, who acted as the agent of the carriers and others in receiving and delivering freight, by whom it was, in accordance with the usual custom, delivered to a teamster, to be carried by him the remainder of the distance, to the residence of the consignee; and the property was so carried by the teamster and delivered to the consignee.

Held, that the duty of the carriers terminated certainly upon the delivery of the goods at the consignee's residence, if not before; and that their liability could not be renewed and re-suscitated by a return of the property to the warehouse by the consignee (*Salinger* *agt. Simmons* (57 Barb., 513)).

9. *Held also*, that the carriers were not responsible for the loss of the goods, because the consignee directed the goods to be taken back to the warehouse, and because it was so taken back. That to make them liable for the loss of the goods after their return, notice of such return should at least have been given, and that they were required to be taken back to the consignor (*Id.*).

10. To render a common carrier or warehouseman liable for the loss of goods, there must be an acceptance of the goods, and the responsibility does not commence until the delivery is complete. It is not enough that the property is delivered upon the premises, unless the delivery is accompanied by notice to the proper person (*Id.*).

11. One who is engaged in the performance of a legal duty, or of an act which, although not enjoined by positive law, yet which is meritorious and praiseworthy, or who is in the exercise of a legal right, and who, while so engaged, is injured through the negligence of another is entitled to recover damages (*Eckert* *agt. The Long Island Railroad Co.*, 57 Barb., 555).

12. The liability of a carrier of passengers, for negligence, is the same, although the injury resulting to the passenger therefrom is occasioned by his own act, where the peril is so great as to justify the act. Per GILBERT, J. (*Id.*).

13. This principle applies also to persons who are not passengers, but who have been placed in peril by the neglect of others, and are doing their best to extricate themselves from such peril; and to persons who are injured while humanely, and without actual negligence, trying to save other lives placed in peril by the negligence of the carrier (*Id.*).

14. Common carriers are liable in two capacities; one as insurers and one as warehousemen. If an injury happens to goods, from any cause except the act of God or the public enemies, while the carriers are insurers, an action lies against them, by the owners, for damages, and is made out without further inquiry. (*Goodwin* *agt. The Baltimore and Ohio Railroad Company*, 58 Barb. 195.)

15. But if the injury happens after the goods are claimed to have been delivered, the question arises whether the defendant's liability as common carriers, in all its rigor, had under the circumstances, ceased; and if so, whether the defendants had exercised that care of the property required of them as warehousemen. (*Id.*)

16. Carriers are bound to deliver goods transported by them. Delivery is not effected by placing the property in a position where it cannot be obtained by the owner or consignee. (*Id.*)

17. A quantity of sheet-iron consigned to the plaintiffs at New York, and transported by the defendants, was unloaded upon the wharf, in New York. The plaintiffs received notice of the arrival of the ship in which the iron was brought, and received a small portion of the iron uninjured. On sending for the remainder, they were unable to get it until some days after it was placed upon the pier, by reason of other freight having been so placed that the iron could not be reached. While it was in this position, it was damaged by rain:

Held, that the defendants were bound to deliver the goods at the usual place; and to deliver them in a conveniently reasonable method for their removal; and that the plaintiffs were bound to exercise reasonable diligence in removing them. (*Id.*)

18. That it was for the jury to determine whether a reasonable time had elapsed after notice of the arrival of the iron, for the plaintiffs to remove it, before it was injured by the rain. (*Id.*)

19. That after the expiration of a reason-

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able time for the removal of the goods, the liability of the defendants as insurers ceased, and their duty or liability became that of warehousemen, which required that they should exercise over the property, and for its protection, ordinary care and diligence. (*Id.*)

20. That the burden of proof was upon the plaintiffs, to show that the defendants did not use such care and diligence; and if the jury found that negligence was proved, the defendants were liable, even though their duty as common carriers was ended. And the jury having found a verdict for the plaintiffs:

Held, that it was sustained by the evidence; and the judgment entered thereon was affirmed. (*Id.*)

21. The rule of damages which prevails in an action for the breach of a contract to transport goods from one place to another, where the owner is unable to procure the goods to be carried in any other manner, does not apply when, upon the failure of the carrier to perform, the owner of the goods can send them by another conveyance. (*Grund agt. Pendergast*, 58 *Barb.*, 216.)

22. In such a case the owner must send the goods by another conveyance; and if he does so, he will be entitled to recover the difference between the price at which the defendants undertook to carry the property, and the price which the owner was compelled to pay, for its transportation. (*Id.*)

23. The rule as to the form of the judgment, laid down in (*7th Wallace's Rep.* 258,) is not binding on the state courts, and is not the correct one, but simply leads to great inconvenience, without any practical advantage. (*Id.*)

24. Where a carrier of goods notifies the consignee of their arrival, and that they must be unloaded and taken away by a specified day, and then causes the goods to be unloaded before the time specified, and they receive injury in consequence of being thus unloaded, the carrier is liable, as such, for the damage resulting from the injury, whether guilty of negligence or not. (*Cook agt. The Erie Railway Company*, 58 *Barb.*, 312.)

25. If the goods are not unloaded until after the expiration of the time fixed for unloading and taking them away, then the carrier is bound to exercise such care and prudence in unloading and caring for them afterwards, and before they are removed by the owner, as a person of ordinary prudence would take of his own property. And if the

goods are injured in consequence of the carrier's neglect to exercise such care and prudence, the carrier is liable to respond in damages for the injury. (*Id.*)

26. And although the goods are not taken by the consignee within the time fixed for the removal, and he either neglects or refuses to take them within such reasonable time, yet the carrier has no right to cast the goods away, or leave them where they will be open and exposed to injury from the elements. (*Id.*)

27. In such a case it is the duty of the carrier to take care of them for the owner. And if he neglects this duty he will be held liable for the damages arising from a want of care. (*Id.*)

28. This care must be such, at least, as a prudent and careful man would take of his own property of like description. (*Id.*)

29. A common carrier may discharge his liability entirely, by placing the goods in a warehouse at the place of destination, or by delivering them safely to some responsible third person who will undertake to keep them safely, and deliver them to the consignee when called for, in case the consignee cannot be found, or he refuses or neglects to take them away within a reasonable time after tender or notice. (*Id.*)

30. After the arrival of goods carried by a railroad company, at their place of destination, and notice to the consignee, the latter commenced removing them, but residing at a distance of twenty miles from the depot, with only one team, he could not conveniently take more than one load per day. The goods were not put into a warehouse, or left with a third person for the owner, but were thrown out of the car, upon the ground, on the company's premises, and by the direction of their agent; and while in this situation, were wet and damaged by the rain, for want of shelter. In an action by the owner, to recover damages of the company, it was held, that the question whether the defendant had taken proper care of the goods, and whether they had been injured by reason of their not having been properly cared for, was a question for the jury, and it was properly submitted to them. (*Id.*)

31. The duty of a carrier is not fully discharged by transporting the goods and giving notice of their arrival, to the consignee; but continues until he has taken care of the goods, by placing

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them in a safe place, or in safe hands, for the consignee. (*Id.*)

32. A carrier of goods is bound either to deliver them to the consignee personally, or to give him notice of the arrival thereof. (*Id.*)

33. Where a carrier delivers goods to a person who has assumed to purchase them of the consignor, in the name of a firm, or to some one authorized by such person, and therefore to the person or persons to whom it was intended by the consignor that they should be delivered, he is not liable to the latter for the value of the goods on the ground that there has been a misdelivery. (*Price* agt. *The Oswego and Syracuse Railroad Company*, 58 Barb. 599.)

34. Where, in an action brought by the consignor, against the carrier, for the value of the goods, the claim was not that the goods were not delivered to the very party to whom they were intended to be delivered, but that such party had assumed a fictitious name, or had falsely pretended to be doing business as a copartnership, at the place where the order was dated, for the purpose of obtaining the goods without payment:

Held, that the truth or falsity of the representations should have been ascertained by the plaintiff before he parted with the property. And that the omission to do so was his negligence, and not that of the carrier. (*Id.*)

35. A carrier is responsible for the delivery of the property to the party entitled to receive it, according to the address; and delivers it at the peril of being held liable for its value in case of any mistake in that particular. But if he delivers the property to the person to whom it is addressed and to whom it was intended by the consignor that it should be delivered, the fact that the goods were obtained from the consignor by means of fraud, and without payment of the price, will not render the carrier liable for such delivery. (*Id.*)

36. Until the consignor, in such a case, shall have repudiated the sale, there can be no strictly legal right, on the part of the carrier, to withhold the property from the actual consignee, any more than though possession of it had been obtained by any other fraud; and upon tender of the freight, by the consignee, is bound to deliver the property to him. (*Id.*)

37. In these days of extensive traffic,

carriers could not abide the consequences of a rule which should impose upon them not only the responsibility of delivering the goods to the actual consignee, but that of determining whether the circumstances are not such as lead to a well grounded suspicion that some fraud has, by the use of fictitious names or otherwise, been perpetrated upon the consignor. (*Id.*)

See EXPRESS COMPANIES. (*Id.*)

COMMON CARRIER. (2 *Lansing.*)

CASES FOLLOWED, EXPLAINED, DISTINGUISHED, LIMITED OR OVERRULED.

1. *Van Allen* agt. *Feltz* (1 *Keyes*, 332), approved and followed (*Lansing* agt. *Blair*, 43 N. Y., 48).
2. *In re Steamboat Josephine* 39 N. Y., 19, commented upon and distinguished (*Sheppard* agt. *Steele*, 43 N. Y., 52).
3. *Strout* agt. *Foster* (1 *How. U. S.*, 89), commented upon and distinguished (*Austin* agt. *Steamboat Co.*, 43 N. Y., 75).
4. *Swift* agt. *City of Poughkeepsie* (37 N. Y., 511), approved (*Bank of Commonwealth* agt. *The Mayor of N. Y.* (43 N. Y., 184).
5. *Williams* agt. *Fitzhugh* (37 N. Y., 441), distinguished (*Brown* agt. *Vredenberg*, 43 N. Y., 195).
6. *Williams* agt. *Williams* (4 *Seld.* 524), partially overruled (*Adams* agt. *Perry*, 43 N. Y., 487).
7. *Kissam* agt. *Forest* (7 *Hill*, 463), criticised (*People* agt. *Cole*, 43 N. Y., 508).
8. *In re Steamboat Josephine* (39 N. Y., 19), explained and limited (*Brookman* agt. *Hamill*, 43 N. Y., 555).
9. The case of *Warren* agt. *Leland* (2 Barb., 613), distinguished from the present case (*Goodyear* agt. *Vosburgh*, 57 Barb., 243).
10. The cases of *Bennett* agt. *Judson* (21 N. Y. Rep., 238), and *Craig* agt. *Ward* (36 Barb., 377), have not established a different rule from that settled in this case, as to a scienter in the vendor of property (*Marshall* agt. *Gray*, 57 Barb., 414).
11. All that it was intended by the court to decide in *Schell* agt. *The Erie Railway Co.* (51 Barb., 368) was that an injunction to restrain the prosecution of an action pending in the same court, is irregular (*The Erie Railway Co.* agt. *Ramsey*, 57 Barb., 459).

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12. The cases of *Wyman* agt. *Wyman* (26 N. Y., 253); *Smith* agt. *The Saratoga Mu. Fire Ins. Co.* (1 Hill, 497); *Phelps* agt. *The Gebhard Fire Ins. Co.* (9 Bosw., 404); and *Burbank* agt. *The Rockingham Mu. Fire Ins. Co.* (24 N. H., 550), commented upon and distinguished from the present (*Lappin* agt. *The Charter Oak Fire and Marine Ins. Co.*, 58 Barb., 325).
13. The decision in *Murray* agt. *Smith* (9 Bosw., 689), disapproved (*Hoyt* agt. *Bonnett*, 58 Barb., 529).
14. *Day* agt. *Saunders* (3 Keyes, 347) followed (2 Lansing, 127).
15. *Van Santvoord* agt. *St. John* (6 Hill, 157), distinguished (2 Lansing, 199).
16. *Smith* agt. *N. Y. Cent. R. R. Co.* (43 Barb., 225) explained (2 Lansing, 199).
17. *Burr* agt. *Stenton* (52 Barb., 377), distinguished (2 Lansing, 238).
18. *Grosvenor* agt. *N. Y. C. R. R.* (39 N. Y., 34) (2 Lansing, 269).
18. *State* agt. *Philbrick* (31 Maine, 401), disapproved (2 Lansing, 329).
20. *Beach* agt. *Furman* (9 J. R., 229), distinguished (2 Lansing, 354).
21. *Forest* agt. *Kissam* (7 Hill, 463) distinguished (2 Lansing, 370).
22. *Vanderkemp* agt. *Shelton* (11 Pai., 38), followed.
23. *Hoyt* agt. *Hoyt* (8 Bosw., 511), distinguished.
24. *Davis* agt. *The Mayor, &c., of N. Y.* (2 Duer, 663), explained (2 Lansing, 396).
25. *Story* agt. *Furman* (25 N. Y., 214), followed (2 Lansing, 12).
26. *Binnard* agt. *Spring* (42 Barb., 470), approved (2 Lansing, 67).
27. *Cole* agt. *Reynolds* (18 N. Y. R., 74), commented on (2 Lansing, 20).
29. *Pearse* agt. *Pettis* (47 Barb., 276), explained (2 Lansing, 492).

CASE ON SUBMISSION.

See PRACTICE. (2 Lansing.)

CATTARAUGUS COUNTY.

See POWER AND AUTHORITY. (2 Lansing.)

CAUSE OF ACTION.

1. Where an action is brought on a contract, all claims arising under the same and then due, constitute an entire and indivisible cause of action, and a judgment therein is a bar to any further action founded on such claims. (*O'Beirne* agt. *Lloyd*, 43 N. Y., 248.)
2. A voluntary compromise or satisfaction of the claim made in an action, which embraces only part of an entire demand, does not necessarily merge the whole demand; it might sever the demand and compromise the part sued for, leaving the rest to stand. (*Id.*)

See ACTION. (*Id.*)

ADMIRALTY JURISDICTION. (*Id.*)

CONTRACT. (*Id.*)

CONSTITUTIONAL LAW. (*Id.*)

EQUITY. (*Id.*)

CENTRAL PARK.

1. The proceedings in reference to improvements, under which the assessments and awards are made and imposed in regard to the Central Park are regulated entirely by statute. (*Matter of Commrs. of Central Park*, ante, 12.)
2. It was clearly the intention of the legislature to make the confirmation of the report of the commissioners of estimate and assessment, final and conclusive in reference to their proceedings, as between the commonalty of New York and all persons whomsoever, in reference to the land taken and the estimate and assessment made and imposed. (*Id.*)
3. All persons are thus advised, that being given the opportunity to be heard, they must appear and by objection, either to the commissioners of estimate and assessment, or submitted to this court, protect whatever rights are invaded or jeopardized. (*Id.*)
4. The applicant in this case, in moving to set aside the order confirming the report of the commissioners of estimate and assessment, does not seem to have presented any objection either to the commissioners or to the court. (*Id.*)
5. Although the award was made to the applicant in the first instance, he could not be justified in relying upon the entry and the abstract of the report, as the object of the publication of notice would be defeated, if the abstract could not be altered; and it was the duty of the applicant to see, if he meant to rely upon it as originally prepared, that it was not at the instance

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of any subsequent claimant having even an apparent title, altered to his prejudice. (*Id.*)

6. The alteration or correction may be made, according to the statute, at any time before the report is presented to the court, after publication; and in this case the alteration, appears to have been made at the proper time. (*Id.*)

7. Although the report, having been confirmed, is final and conclusive in regard to the estimates and awards, it is not conclusive upon the rights of claimants *intersece*. The remedy in such case is by action against the person to whom the award was given, after payment thereof to him, by the person to whom of right the money paid belonged. (*Id.*)

CERTIORARI.

See TAXES. (43 N. Y.)
CANAL APPRAISERS. (2 Lansing.)

CHALLENGE.

See JURY. (43 N. Y.)

CHARGE OF THE COURT.

1. In an action against an overseer of highways for wrongfully diverting a watercourse on the plaintiff's land, it is error for the judge to instruct the jury that the diversion of the waters on the plaintiff's land was wrongful, and that the plaintiff is entitled to recover the damages he has sustained thereby. (*Moran* agt. *McClearn*, ante, 289.)

2. Whether the diversion was wrongful or not, depended upon a variety of questions of fact which were, and fairly might be, controverted upon the evidence, and the statement of the court to the jury seems to preclude any consideration by them of the various facts in controversy, and upon which the legal right depended, and which it was error to withdraw from the jury, and pass upon as a question of law. (*Id.*)

3. It is also error for the court to instruct the jury that if the defendant acted *maliciously* in diverting the water, to injure the plaintiff, the plaintiff was entitled to recover all the damages he had sustained, whether the defendant had a right to turn the water or not. (*Id.*)

4. This amounts to an instruction to the jury that, notwithstanding a *public officer* may be fully warranted and duly

authorized in law to do the act complained of, yet his *motives* are, in such a case, the subject of inquiry by the jury, and if they come to the conclusion that his motives were selfish and sinister, then the act becomes unlawful. (*Id.*)

5. Such a rule determining the liability of public officers—not according to the lawfulness of their acts, but according to what a jury may suppose to have been their secret motives—cannot be tolerated. (*Id.*)

CHARITABLE DEVISES AND BEQUEST.

1. When there is an apparent discrepancy between two statutes, such exposition should be made as that if possible both may stand together; and the act of 1840 and 1841, authorizing educational corporations to take property in trust, without any expressed limit, are not to be construed as extending the capacity to take, when limited by their charters, to a fixed sum, or to free them from the restraints of the Revised Statutes and the statutes of mortmain as to amount. (*Chamberlain* agt. *Chamberlain*, 43 N. Y., 244.)

2. For the purpose of ascertaining the estate, only half of which can be devised to charitable or educational corporations, under the act of 1860, the widow's dower and the debts are to be first deducted. (*Id.*)

3. A testator cannot give to two or more corporations in the aggregate more than he can give to a single object, viz., one-half of his estate. (*Id.*)

4. An academy incorporated for the promotion of literature, and authorized to educate males and females, may establish separate departments for each, and, under the general acts of 1840 and 1841, take and hold real estate in trust, to be used for the benefit of either department. (*Adams* agt. *Perry*, 43 N. Y., 487.)

5. Nor is a devise to the academy for such purpose void because it provides that the tuition of daughters of deceased officers, &c., who attend the academy shall be free. This does not constitute a trust, in favor of such officers' daughters, nor render them the beneficiaries, but if they attend, they receive their tuition free, and if they do not, the academy still takes the property for its own use. (*Id.*)

See WILL. (*Id.*)

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CHATTEL.

See JUDGMENTS AND EXECUTIONS. (2 *Lansing*.)
OWNERSHIP IN COMMON OF CHATTELS. (*Id.*)

CHECK.

See BILLS OF EXCHANGE. (43 *N. Y.*)
PAYMENT. (*Id.*)

CIRCUMSTANTIAL EVIDENCE.

See BURGLARY. (43 *N. Y.*)

CIVIL WAR.

1 By the act of congress of July 13, 1861, recognizing a state of civil war between the United States government and certain states of the union, and the proclamation of the president, of August 16, 1861, all commercial intercourse between the citizens of the loyal states and the inhabitants of those states of the union declared to be in insurrection was interdicted and became unlawful. (*Woods* agt. *Wilder*, 43 *N. Y.*, 164.)

4. This interdiction of intercourse involved a prohibition against every species of private contract with a subject or citizen of the enemy. (*Id.*)

5. A bill of exchange drawn 22d August 1861, by a citizen of the state of Georgia, upon his copartners in the city of New York, after the act of congress of July 13, 1861, and the proclamation of the president of August 16, 1861, made pursuant thereto, is an illegal and void contract, and cannot be enforced against such copartners. (*Id.*)

6. And this would be so, although the funds of a citizen would thereby be withdrawn from hostile territory. (*Id.*)

CLOUD UPON TITLE.

1. Where the defect appears upon the face of the proceedings, through which title is claimed, and such proceedings must necessarily be proved by the purchaser in any suit to assert his right, there can be no legal cloud upon the owner's title. (*Overing* agt. *Foot*, 43 *N. Y.*, 290.)

See ASSESSMENTS. (*Id.*)

CODE.

See PLACE OF TRIAL. (43 *N. Y.*)
STATUTE OF LIMITATIONS. (*Id.*)

COMMENCEMENT OF AN ACTION.

See PRACTICE. (2 *Lansing*.)

COMMISSION.

1. There is no case which holds that the clerk's name is essential to the validity of a commission issued to take testimony. (*Goodyear* agt. *Vosburgh*, ante, 421.)

2. Where the commission is issued by the authority of the court, the signature of the judge is sufficient, without the signature of the clerk. (*Id.*)

3. Where the return of a commissioner shows, that the witness was duly and publicly sworn, pursuant to the directions "hereunto annexed and examined," with a reference to the provisions of the Revised Statutes, which are annexed and constitute a part of the commission, the return is sufficient. There is nothing in the statute which requires a separate certificate. (*Id.*)

4. Where the Statute has been substantially complied with in the return, the deposition should not be excluded, except upon the clearest grounds of error, amounting to something more than a mere irregularity. (*Id.*)

5. Where the stipulation between the attorneys authorized the plaintiff's attorney to direct upon the back of the commission the manner in which it should be returned, and that the commission and deposition "shall be returned by mail to S. Estes, Esq., clerk," &c.; and the plaintiff's attorney did direct that the commission be returned to the county clerk, but did not direct that it should be returned by mail; but it appeared that in fact it had been returned by mail in pursuance of the stipulation:

Held, that the stipulation did not require that the attorney should direct in terms that the commission should be returned by mail, but generally the manner in which it should be returned, and, in accordance with this, a direction was made to return it to the county clerk. This was a compliance with this provision of the stipulation, as to the manner of the return. The omission to state that it should be returned by mail, did not, of itself, violate the terms of the stipulation and vitiate the deposition. (*Id.*)

6. But even if it was erroneous, the error is substantially obviated by a compliance with another provision of the stipulation that it shall be returned by mail. (*Id.*)

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COMMISSIONERS OF HIGHWAYS.

1. Where the commissioners of highways of two towns make a joint contract with an individual to build a bridge across the stream which is the boundary line between the towns, and after the completion of the bridge the commissioners of one of the towns accept the same, on the part of their town, and pay the contractor its full equitable proportion or half part of the contract price, and the commissioners of the other town, on their part, do acts, by part payment, which amount to a conditional acceptance of the bridge, the latter commissioners are equitably bound to pay all that remains unpaid by them; and an action will lie against them by the contractor, for the amount, while joining the other commissioners as parties defendants. (*Harris* agt. *Houck*, 57 *Barb.*, 619)

2. The act of 1857, providing that whenever two or more towns shall be liable to make or maintain any bridge or bridges, it shall be lawful for the commissioners of said towns, or of commissioners of either one or more towns, respectively, to enter into joint contracts, and that such contracts may be enforced against such commissioners, jointly or severally, respectively. (*Laws* of 1857, ch. 383, § 2). authorizes a several action against the commissioners of any town so contracting without joining as defendants the commissioners of the other town or towns contracting. (*Id.*)

3. In accepting a bridge constructed under a contract made by the commissioners of several towns jointly, each board acts for itself severally. The statute nowhere provides for a meeting of the commissioners of two or more towns as a joint board. (*Id.*)

COMMISSIONERS OF TOWNS.

See TOWNS. (57 *Barb.*)

COMMITMENT.

See SURROGATE. (2 *Lansing*.)

COMMON CARRIERS.

1. The defendant who owned and kept for the convenience of his business as a manufacturer of staves, a canal boat suitably manned and equipped, received from the plaintiffs, who were common carriers, a cargo of the

merchandise of their shippers indifferently, and undertook its transportation on such boat to a point on their route of business, for the usual rates of charge to be collected and paid over by the plaintiffs, less a commission retained.

Held, that he was not liable to the plaintiffs as a common carrier, although he had applied for the cargo, knowing the general ownership it must have, and a year previously had made with them and performed a similar contract. (*Fisk* agt. *Clark*, 2 *Lansing*, 175.)

2. The New York Central Railroad received goods from the plaintiff, directed to a certain place on the Michigan Southern railroad, and under a special agreement limiting its liability to its own route, carried them to Suspension Bridge, upon such route, and then delivered them to the defendant. The defendant's road extending from Suspension Bridge, N. Y., to Windsor, Canada, connected with that of the Michigan Southern Railroad Company by ferry from Windsor, at Detroit, where under a contract between the two companies, for the purpose, the defendant was accustomed to deliver freight arriving by its line to the Michigan Southern Company for transportation to points on the road of the latter, which collected the entire freight charges on the final delivery, and periodically accounted for the portion thereof due to the defendant. The defendant received the goods in question for transportation without limiting its general duties as a common carrier.

Held, that it implicitly undertook for the carriage thereof to the place of destination, and was liable therefore as a common carrier after it had delivered them to the Michigan Southern Company at Detroit. (*Root* agt. *G. W. Railway Co.* 2 *Lansing*, 199.)

3. The case distinguished from *Van Santvoord* agt. *St. John* (6 *Hill*, 157) by reason of the contract between the carriers and their custom under it. (*Id.*)

4. If doubt existed as to such liability of the defendant at common law, its liability under the statute of 1847 (chap. 270, § 9), was undeniable. (*Id.*)

5. The defendant having made the contract for transportation at the terminus of its route within the State, it was liable under the provisions of the act although a foreign corporation. (*Id.*)

6. And this was so, although the Michi-

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- gan Southern Company was a foreign corporation also, and not liable over to the defendant under the act. (*Id.*)
7. It seems that the statute in question is not limited to domestic corporations only. (*Id.*)
8. Nor was the defendant's liability under it, for the plaintiff's goods while in charge of the Michigan Southern Company, limited to the case of loss by reason of the latter's "neglect or misconduct." (*Id.*)
9. Nor is the statute in question simply declaratory of the common law; it created a new rule of liability in respect to connecting railroad corporations. (*Id.*)
10. Nor was it material on the question of the liability that the New York Central Company, and not the defendants, originally received the goods.
11. By the act in question each successive railroad company forming a link in the chain of communication between the place of freighting and the place of destination, which agrees to convey property beyond the terminus of its own road, and receives the goods under such an agreement, is liable as a common carrier for the delinquencies of each of the other roads running in connection with it, over which the property shall subsequently pass, on the route to delivery. *Smith* agt. *N. Y. C. & B. R. Co.* (43 *Harb.*, 225) upon the latter point explained. (*Id.*)
12. The defendants as common carriers, received merchandise for transportation from the plaintiff, addressed to a consignee at W., which they carried to C., the terminus of their route, and delivered to an irresponsible warehouseman, a common agent, in that respect for several other carriers, and for themselves; from the premises of the warehouseman it was taken by a teamster, such being ordinarily the means of transportation between C. and W., and left in the absence of the consignee, on his premises, with notice to, and in the presence of a member of his family; the consignee afterward refused to receive it, and notified the teamster thereof, who returned it to the warehouse of C., without notice of any kind to the warehouseman, where it was lost, and the plaintiff brought a suit to recover its value.
- Held*, that he was properly non-suited. (*Salinger* agt. *Simmons*, 2 *Lansing*, 325.)
13. There was a delivery to the consignee, and thereupon if not before the defendant's contract was performed, and they could not therefore be held liable for previous negligence in delivering at C. to an irresponsible warehouseman; nor could the return of the merchandise to the defendant's agent without notice as to which of his principals it was intended for, revive their liability. (*Id.*)
14. Where common carriers by water under false and fraudulent representations, as to the character of their vessel, made a special contract, to carry goods at the shipper's risk, he insuring at the carrier's expense; and the shipper failing to effect an insurance because the vessel was not as represented, prohibited the carriers before the voyage began from taking the goods, and they persisting, the goods were damaged on account of a collision on the way.
- Held*, that the shipper might treat the carriers as if they had undertaken to transport the goods without limitation of their liability, and sue, and recover from them upon that theory. (*Ducky* agt. *Silliman*, 2 *Lansing*, 361.)
15. The defendants as trustees for the mortgage bondholders of a railroad company, obtained a decree of foreclosure and sale under the mortgage by which they were authorized in default of bidders to purchase the mortgaged property as trustees, also to operate the railroad and receive the income thereof, until a sale or transfer. Having purchased under the decree, and operated the road as thereby provided until a transfer to a company newly organized.
- Held*, that they were liable as common carriers for goods received by them as such, while operating the road as trustees. (*Rogers* agt. *Wheeler*, 2 *Lansing*, 486.)
16. *Held* further, that the defendants were not in possession of the property as receivers thereof, and were not relieved from liability as standing in such relation to the court, their accountability being not to the court, but to the bondholders. (*Id.*)
17. And it seems that without the provisions of the decree authorizing them it was the duty of the defendants to bid in the property if necessary to protect the interests of their *cestui que trust*. (*Id.*)
18. *Held* further, the defendants having surrendered, conveyed and delivered the whole property purchased to a

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company newly organized, in obedience to a decree of the court, which provided for full indemnity to them by lien upon the property, as "against all liability of every description, incurred or to arise out of any act or contract done or made, or omitted to be done by them as such trustees," and having in the deed reserved such lien, that the transfer did not affect their liability for goods received by them as common carriers before the same took place. (*Id.*)

See DELIVERY. (*Id.*)

COMPLAINT.

1. A plaintiff who seeks to obtain an account of the personal estate which came to the hands of an administratrix—she being dead, her personal representatives are indispensable parties. (*Silsbee* *agt. Smith, ante*, 418.)
2. And the persons who are in possession of the lands sold by the surrogate to pay the testator's debts, are interested in having the administratrix, representatives made parties to the end that it may be established, if it can be, that debts of the testator were unpaid at the time the order of the surrogate to sell was made. (*Id.*)
3. An offer to pay whatever may be found due upon the mortgages is an indispensable averment in a bill to redeem, or a tender of an amount which the plaintiff concedes to be due. Without one or the other of these averments, the complaint does not state a cause of action. (*Id.*)
1. It is not admissible to substitute or introduce a new and distinct cause of action by way of supplemental complaint. (*Buchanan* *agt. Comstock*, 57 *Barb.*, 582.)
2. The matters to be introduced by supplemental complaint must be consistent with, and in aid of, the case made by the original complaint. (*Id.*)
3. Where an action was brought to settle and determine the partnership rights of the plaintiff and one of the defendants, and not to determine anything between such defendant and a co-defendant, under an agreement between them:

Held, that the plaintiff could not by a supplemental complaint change the action in its entire scope and purpose, by bringing in and substituting a new controversy—a new and independent cause of action springing out of a transaction occurring since the com-

mencement of the action, between the defendants, with which the plaintiff had no connection. (*Id.*)

4. It is a good objection to a supplemental complaint, that it proposes to introduce new matter of controversy, which would complicate the action, with no advantage to the parties. (*Id.*)

See AMENDMENT. (*Id.*)
CORPORATIONS. (*Id.*)

5. If the complaint in an action to recover the possession of personal property, states facts sufficient to show that in law the defendant's holding of the property is unlawful, that is sufficient; especially after judgment. (*Fullerton* *agt. Dalton*, 58 *Barb.*, 236.)
6. The omission to allege, in the complaint, a demand of the property before suit brought, is cured by proof of the fact, by the report of the referee, finding the fact of a demand, and by the judgment. (*Id.*)
7. When the parties go down to trial and a cause of action is proved, though the complaint may be defective, tested merely as a pleading, upon demurrer, it is the duty of the referee, or a court, to conform the pleading to the facts proved, in furtherance of justice; and, after judgment, if it be entered according to a case duly proved, it is the duty of the court to amend, or to regard the pleading as duly amended. (*Id.*)
8. The prayer for relief, in a complaint, is no part of the cause of action, and does not determine the character of the action. (*Graves* *agt. Spier*, 58 *Barb.* 349.)
9. The nature of the action, and the cause of action, are shown by the facts stated in the complaint. (*Id.*)

See ACCOUNT. (*Id.*)
ACTION. (*Id.*)
FORCIBLE ENTRY AND DETAINER. (*Id.*)
MARRIED WOMEN. (*Id.*)
STOCK. (*d*)

COMPOUNDING CRIMES.

See PROMISSORY NOTES (58 *Barb.*)

COMPROMISE.

See CAUSE OF ACTION. (43 *N. Y.*)

CONDITION.

See DOWER. (43 *N. Y.*)
TRUSTS AND TRUSTEES. (*Id.*)

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INSURANCE, (FIRE.) (57 Barb.)

CONFEDERATE STATES.

See BILLS OF EXCHANGE. (43 N. Y.)
PARTNERSHIP. (Id.)

CONFESSIONS.

See CRIMINAL LAW. (57 Barb.)

CONFLICT OF LAWS.

1. The law of the testator's domicile controls as to the formal requisites essential to the validity of the will, the capacity of the testator, and the construction of the instrument. (*Chamberlain* agt. *Chamberlain*, 43 N. Y., 424.)
2. When, by the *lex domicilii*, a will has all the formal requisites to pass title to personalty, the validity of particular bequests will depend upon the law of the domicile of the legatee, except in cases where the law of the domicile of the testator in terms forbids bequests for any particular purpose, or in any particular manner, in which latter case the bequest would be void everywhere. (Id.)

See WILLS. (Id.)

CONSIDERATION.

See CONTRACT. (43 N. Y.)

1. A promise by the defendant to pay a certain sum in settlement of a dispute respecting the plaintiff's claim:

Held, to be supported by a good consideration. (*Scott* agt. *Waring*, 2 Lansing, 49.)

See BILLS OF EXCHANGE AND PROMISSORY NOTES. (Id.)
POWER AND AUTHORITY. (Id.)

CONSIGNOR AND CONSIGNEE.

See BILL OF LADING. (2 Lansing.)
DEMURRAGE. (Id.)

CONSPIRACY.

1. In June, 1864, four persons, anticipating a government call for troops, agreed to divide the profits and share the losses of any contracts made by them individually or collectively, for furnishing the quota of recruits of any one or more towns of a certain county, for a sum not less than \$500 per man, and that they or either of them, should make no agreement to furnish the quota of any town for a less sum than \$500 per man, without the assent of all:

Held, that the agreement was designed to restrain competition in procuring enlistments, and tended to increase the burdens of taxation and was void as against public policy, and that every part of the contract into which it had been incorporated was also void. (*Marsh* agt. *Russell*, 2 Lansing, 340.)

CONSTITUTIONAL LAW.

1. The constitution, (art 1, § 7,) provides that when private property shall be taken for public use, the compensation therefor, when not made by the state, shall be ascertained by a jury, or by not less than three commissioners, appointed by a court of record as shall be prescribed by law. (*Rochester Water-Works Co.* agt. *Wood*, ante, 53.)
2. The provision in the charter of the Rochester Water-Works Company, (Laws 1852, §§ 8-10,) which authorizes the court to increase or reduce the amount of damages reported by the three commissioners, for the taking of land for the use of said company, is unconstitutional and void. (Id.)
3. When the constitution requires damages to be assessed, either by a jury of 12 men, or by three commissioners, it does not require argument to demonstrate that it cannot be done by one, nor by three or more judges of this or any other court. (Id.)
4. It is competent to provide for an appeal to the court, in order to protect the parties against an imperfect appraisal; and upon that appeal the court can confirm or set aside the assessment, and correct irregularities committed by the commissioners or parties in the course of the proceedings; and this is the extent of the power possessed by the court. (Id.)
5. The general term, on appeal, has the power and it is its duty to make such an order as the appeal term should have made in such a case. (Id.)
6. In this case, the special term having reduced the amount of damages reported by the commissioners, the general term vacated that order, and remitted the case to the special term for the appointment of new commissioners to make the appraisal. (Id.)
7. Justices' courts have had jurisdiction of a class of cases known as trespass or trover, for a limited amount since the organization of the government, and the mere form of an action does not affect their jurisdiction. (*Crouse* agt. *Walrath*, ante, 86.)

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8. The legislature as the law-making power, have the right to increase the jurisdiction of justices' courts, if they do not violate the provisions of the constitution. (*Id.*)

9. Subdivision 10 of section 53 of the Code of Procedure is not obnoxious to the provisions of the constitution, nor in conflict with the 2d section of article 1 of the constitution, with reference to trial by jury. (*This is adverse to the case of Baxter agt. Putney, 37 How., 140.*) (*Id.*)

10. The act of 1867, chap. 814 amending chapter 459 of the laws of 1862, authorizing the seizure of animals trespassing on a private enclosure (or in public high-ways,) is constitutional and valid. (*This agrees with the case of Cook agt. Gregg, said to have been tried at the Madison circuit in October 1868, and judgment affirmed on appeal at the general term held in the sixth judicial district in January 1870. PARKER, J. writing the opinion, which has not been reported; and Fox agt. Dunckel, 38 How. 136; but is adverse to McConnell agt. Van Aerman, 56 Barb., 534.*) (*Squares agt. Campbell, ante, 193.*)

11. A clause in the general act of the legislature "making appropriations for certain expenses of government, and for supplying deficiencies in former appropriations," appropriating from the state treasury the sum of \$10,000 for the construction of a bridge over the Cattaraugus creek at a particular locality, under the direction of certain commissioners named, further provided, that the supervisors of the counties of Erie and Chautauqua should assess upon their respective counties a moiety of such further sum, not exceeding \$10,000, as the said commissioners should certify to be necessary for the completion of the bridge:

Held, that the latter provision was unconstitutional and void. As to this provision, the bill is a "local" bill, and the subject of it is not expressed in the title. It is also in conflict with the constitution in that the title embraces more than one subject, which renders the private or local provisions embraced therein invalid. (*People agt. Supervisors of Chautauqua, 43 N. Y., 10.*)

12. An act is local within the meaning of the constitution, which, in its subject, relates but to a portion of the people of the state or to their property; and may not, either in its subject, operation, or immediate and necessary

results, affect the people of the state or their property, in general. (*Id.*)

13. A claim for labor performed, and materials furnished upon and for the hull of the vessel, while in the process of construction before launching, is not a claim upon a maritime contract, and not within the jurisdiction of the admiralty courts. The lien law of 1862, entitled "an act to provide for the collection of demands against ships and vessels," giving a lien on the vessel for such labor and materials, and providing for the enforcement thereof *in rem*, is, as to such contracts, constitutional and valid, and no infringement upon the federal maritime jurisdiction. (*Sheppard agt. Steele, 43 N. Y., 52.*)

14. *In re Steamboat Josephine*, (39 N. Y., 19.) commented upon and distinguished. (*Id.*)

15. The act is not unconstitutional, as infringing upon the right of trial by jury. Liens were given, in such cases, before the constitution of 1846, which were enforceable in equity without a jury. They are not, therefore, cases where, within that constitution (art. 1, § 2,) a trial by jury had therefore "been used." (*Id.*)

See ADMIRALTY JURISDICTION. (*Id.*)
POWER. (57 Barb.)

16. The act of congress approved March 3, 1865, amending the several previous acts providing for "the enrolling and calling out of the national forces," &c., which provides, (§ 21,) that in addition to the other lawful penalties of the crime of desertion from the military or naval service, there shall be a forfeiture of the rights of citizenship, &c., is constitutional. It is not an *ex post facto* law; neither is it a bill of attainder for the reason that it contemplates a trial by a court martial to enforce that penalty, together with the other penalties for desertion. (*Gotcheus agt. Matheson, 58 Barb., 152.*)

CONTEMPTS.

1. An order for the payment of a sum of money, as *alimony*, in an action for a divorce, being an interlocutory, or *ad interim*, order, cannot be enforced by execution—that process being allowed only upon final judgment (except for interlocutory costs); and, unless, therefore, a party can be proceeded against under the statute concerning *contempts to enforce civil remedies*, there does not seem to be any remedy for their collection, unless it can be found in the

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power of the court to *sequester* the property of the husband, which is doubtful. (*Ford* agt. *Ford*, ante, 169.)

2. So far as the power of the court to punish contempts is derived from the statute, such power can be exercised only in the manner prescribed in the statute, and which in a case of disobedience of an order to *pay money* is a *precept and committal to prison*. (*Id.*)
3. For any other disobedience to any lawful order or decree of the court; and all other cases where attachments and proceedings as for contempts have been usually adopted and prescribed in courts of record to enforce civil remedies, or to protect the rights of parties, the offending party may be committed to close custody, and deprived of the liberties of the jail. (*Id.*)
4. As this case is, under and within the statute, it is not necessary to assert or refer to the *common law power* of a court of record to punish contempts. The statute, it has been held, has not taken away such power. (*Id.*)
5. From an examination made of the statute and of the cases bearing upon the question:

Held, that in the ordinary case of the disobedience of an order to *pay ad interim alimony*, the court has no power to punish, otherwise than by a committal to prison, under the 4th section of the statute. (2 R. S., 534.) (*Id.*)

6. The right to go upon the *jail limits* is derived from the statute. (2 R. S., 433, § 40,) and not from any mandate put into the precept of committal. (*Id.*)
7. It will be sufficient, therefore, if the precept recites the order for the payment of money, and contains a command to the sheriff to commit the person to prison. It will then become a question between the prisoner and the sheriff whether the former should be allowed to go upon the limits of the jail. (*The case of Ward* agt. *Ward*, 6 Abb., N. S., 79, holding that the precept must be in form to *entitle the prisoner to the jail limits, not concurred in.*)
8. An attachment may lawfully issue against a defendant for the non-payment of *alimony*; and under it he may be committed to *close confinement* in jail. (*Lansing* agt. *Lansing*, ante, 248.)
9. Where it appeared that the defendant, for a year and a half after the decree against him for alimony and for costs, in an action for divorce—amounting to some \$400, had not paid any part

thereof, nor had he apparently, made any effort to earn money to make such payment, but had lived with and been supported by his father:

Held, on a motion and affidavits for his discharge on the ground of his *inability* to pay, that the facts stated on the motion did not warrant his discharge as he did not show why he had not made any effort to earn money to pay the sums required by the decree; but rather that it appeared that he wilfully intended to avoid such payment, although he swore to his inability to pay. (*Id.*)

10. Where an injunction issued, and was served on the defendant, in an action against the president of an association, and purported to restrain him "as president" of the association, "its officers and members":

Held, that the association to whom the service was made known and the summons, complaint and order were read at a meeting of the association, by its officers acting thereat, were amenable for contempt in taking proceedings contrary to the prohibitions of the injunction. (*Rorke* agt. *Russel*, 2 Lansing, 242.)

See SURREGATE. (*Id.*)

CONTINGENT GUARANTY.

See MORTGAGE OF LAND. (2 Lansing.)

CONTRIBUTORY NEGLIGENCE.

1. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under circumstances constituting rashness in the judgment of prudent persons. (*Eckert* agt. *Long Island R. R. Co.*, 43 N. Y., 502.)
2. A person voluntarily placing himself, for the protection of *property* merely, in a position of danger, is negligent, so as to preclude his recovery for an injury so received. It is otherwise, however, when such an exposure is for the purpose of saving human life, and it is for the jury to say, in such cases, whether the conduct of the party injured is to be deemed rash and reckless. (*Id.*)
3. Accordingly, where the plaintiff's intestate, seeing a little child on the track of the defendant's railroad and a train swiftly approaching, so that the child would be almost instantly crushed, unless an immediate effort was made to

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save it, and thereupon, in the sudden exigency of the occasion, rushed to save the child, and succeeding in that, lost his own life by being run over by the train :

Held, that his voluntarily exposing himself to the danger, for the purpose of saving the child's life, was not, as matter of law, negligence on his part precluding a recovery, and that the court did not err in refusing to nonsuit on that ground. (*Id.*)

4. The plaintiff's testator, residing at S., and desirous of coming to A. by the defendant's railroad, took passage on a caboose attached to a freight train, and not intended for passengers. The caboose was left at a "round house," a quarter of a mile distant from the depot. The testator had traveled by this train before, knew that the caboose was not taken to the depot, and was entirely familiar with the locality. After leaving the caboose, he walked on the main track, upon which his view was clear and unobstructed both ways, toward the depot. During the walk, his companion, desiring him to wait for him a moment, the testator assented, and while so waiting, stepped behind several empty cars standing on the next parallel track, on a sudden personal necessity. While, there standing between the rails of the track, a train, backing down on that track, struck the other end of the empty cars, propelled them upon and over him, injuring him so seriously that he died in a few minutes :

Held, that these facts showed negligence, as matter of law, on his part, precluding his representative from recovering for his death, and that it was erroneous to have refused to nonsuit on that ground. (*Van Schaick Ex'r vgt. Hudson River R. R. Co.*, 43 N. Y., 527.)

See NEGLIGENCE. (*Id.*)

CONTRACT.

1. Where a written contract is entered into between the plaintiffs and defendants by which the latter agree to rent to the plaintiffs a cattle barn connected with the defendant's distillery, for a certain time, and also agree to furnish to the plaintiffs, at the barn, slops from their distillery—One hundred and eighty-three bushels of slops *per diem*, during the term; and the plaintiffs agree to pay for the slops and the rent of the barn, at the rate of nine cents per bushel of the slops furnished, which agreement is carried into execution by the parties according to its terms :

2. The contract is not one to manufacture or furnish a manufactured article, in the sense that in every sale and purchase of an article to be manufactured, there is an *implied warranty* that the article, when delivered shall be of a *merchantable quality*; nor does an article, designated not otherwise than as "slops from their distillery," constitute a manufactured article within the meaning of the rule which implies a warranty of merchantable quality. (*Holden vgt. Clancy*, ante, 1.)

3. Consequently, an objection made by the plaintiffs pending the contract, that the defendants were buying and using in their distillery damaged grain or grain which had been scorched and injured by fire during the burning of an elevator in which it was stored, the slops from which were injurious to the plaintiff's cattle which they were fattening, could have no force or effect in reference to a recovery upon an implied warranty of the value of the slops. (*Id.*)

4. It is not reasonable to suppose that in contracts for the sale of this refuse material, it is the expectation of either party that the manufacturer is to be controlled in his choice of material or machinery to be used, by any consideration as to the effect which it may have upon the value of the refuse material resulting from the process. (*Id.*)

5. And it seems absurd to suppose there can be, in the absence of express contract or of fraud or imposition, any responsibility for the quality of what is sold as slops or swill. The plaintiffs had what they bargained for, "slops from the distillery," and it would seem reasonable to apply to such a case, the doctrine of *caveat emptor*. (*Id.*)

6. But if there were a warranty of merchantable quality implied in such a sale the plaintiffs would not be entitled to recover in this case, since it appeared that they received and consumed the slops from day to day, with a full knowledge of their quality, and without returning or offering to return them, or giving the defendants notice to take them away or not deliver any more. This was a complete waiver of the alleged defects. (*Id.*)

7. Where a daughter received, as a gift from her mother, an ewe lamb, and an agreement was made at the same time by the mother with her father—the daughter's grandfather—to keep the sheep for the granddaughter, upon the terms of giving the latter all the increase, and the grandfather to have

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the wool for the keeping; and the increase for some six years amounted to seventeen sheep:

Held, on a constable's sale of these seventeen sheep, upon an execution against the grandfather, as the property of the latter, that he had no title to these sheep; he was a mere bailee thereof; nor had he any title to the wool, until he had performed his entire contract of keeping the sheep till shearing time; and for the entire performance of this contract on his part, he was entitled to the consideration promised, to wit: the wool; and part performance, on his part, only, gave no title; and the constable, by his levy, took no other or better title than the bailee had. The title to the sheep was in the granddaughter—the plaintiff. (*Hasbrouck agt. Bouton, ante, 208.*)

8. A contract that the plaintiff is to make, for the defendants, three or four models of a mowing machine at once and without delay, means that the work shall be done as soon as it can reasonably be performed by the plaintiff. (*Sharpe agt. Johnson, ante, 400.*)

9. Where no price is agreed upon for the models, the law fixes the price at what the articles when made and delivered, shall be reasonably worth. (*Id.*)

9. Such a contract is entire for the making of the three or four models. This leaves it optional with the plaintiff whether he will make three or four—no orders on the subject being given by the defendants. By making three, therefore, he completes the contract, as to the amount of work and labor and materials to be done and furnished. (*Id.*)

10. Where it is found as a fact that the first model was made and delivered in time, but that the other two was not made and delivered in time, the defendant by accepting the first model did not become liable to pay for that. That was only part performance. The contract was not performed by the plaintiff so as to entitle him to recover anything, until all three were made and delivered or in readiness for delivery, in pursuance of the entire contract. (*Id.*)

11. Before a party can recover upon a contract he must show that he has performed on his part. If he counts in his complaint simply for work and labor, the other party may defeat the action by setting up as a defense, and proving that the work and labor was done in

pursuance of a contract between the parties, which has not been performed by plaintiff. (*Id.*)

12. Where sheep were let by the plaintiff to the defendant, by an agreement in writing, for two years, on certain terms and were to be returned in the same condition as when let; and they were returned by the defendant at the time specified (December 1st, 1868), and the plaintiff inquired of the defendant if they had been with a buck, the defendant represented that they had not, and plaintiff thereupon delivered up the contract and accepted the sheep. (*Williams agt. Frazier, ante, 428.*)

13. The sheep had, as the proof showed, been with a buck at an improper season, and commenced dropping their lambs during the winter, and a number of the lambs died in consequence, of being dropped in cold weather. (*Id.*)

14. To establish a measure of damages, the plaintiff put the question, "What were these sheep worth less by reason of their dropping their lambs earlier than if in proper season?" The question was objected to as incompetent, and not the legal and proper measure of damages. The objection was overruled, and the witnesses answered, \$2 75 each. (*Id.*)

15. This depreciation in value was founded solely, as appeared from their testimony, upon their estimate of the value of lambs in August and September afterwards, as sold to the butchers:

Held, that this evidence was clearly incompetent on the subject of damages. It furnished no foundation for estimating damages on account of the breach of the contract which was claimed. It is altogether too remote, fanciful and speculative to form a standard for estimating damages. It does not touch the diminished value of the animals themselves but only the increased value of their progeny. (*Id.*)

16. The true criterion, if there was a breach, was, what the animals were worth less at the time for sale in the market, with their true condition known to the purchaser:

Held, also that there was no breach of the contract by the defendant. The defendant proved, and it was contradicted by the plaintiff, that the sheep when he took them of the plaintiff were in the same condition in regard to their pregnancy, as those he returned, and began to drop their lambs in January, and dropped them in February and March. And the con-

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tract was that the sheep were to be returned in the same condition as when taken—which they were in fact. (*Id.*)

17. The defendant, a cement manufacturer having on the 13th of July made a contract with the plaintiff to sell and deliver to him, at an agreed price, 5,000 barrels of cement, "to be delivered and received in lots every week or two of about 400 barrels, all to be delivered and taken on or about the 4th of November," on the 26th of July made an offer in writing, that the plaintiff have "the privilege extended to him of taking 5,000 barrels of cement in addition to the 5,000 agreed upon heretofore, and upon the same terms and conditions." The defendant delivering cement from time to time on the 9th of September the plaintiff wrote to the defendant as follows: "You may enter my order for the acceptance of your offer (till October 1st, time given to conclude on) for the 10,000 barrels cement, to commence from date of first lot.

Held, in an action for refusal to deliver, that this was a valid and binding acceptance of the offer of the defendant of July 26th, and constituted a valid contract between the parties; that it was not a mere notification by the plaintiff that he would avail himself of the privilege to accept the defendant's offer by the 1st of October; and that the reference to that date in the acceptance was to be construed as a mere reminder by the plaintiff that his acceptance was within the time he understood he had to make it (*O'Neill* agt. *James*, 43 N. Y., 84.)

18. *Held* further, no demand having been made for the balance of the cement undelivered until after the 1st of November, that the plaintiff did not, by that omission, impair his right to receive the whole after that time. The defendant having until the 1st of November to deliver the cement, and being in no default before that date, as long as the lot of 400 barrels each were delivered weekly, if he desired to cut off the plaintiff's right to demand and receive the balance of the whole quantity after the 1st of November, he must on or before that day tender the cement then undelivered. (*Id.*)

19. Where a contract for the performance of any public service or work is to be awarded to the bidder therefor offering terms most favorable to the public, any agreement between parties designing to make bids, tending either directly or indirectly to restrain or

lessen rivalry and competition between them, is void as against public policy, even although it may not appear that such agreement did really produce any result detrimental to the public interest. (*Atcheson* agt. *Mallon*, 13 N. Y., 147.)

20. Accordingly, where a board of auditors of a town were by statute authorized to receive sealed proposals for the collection of the taxes, to be assessed in the town and toward the collection of the taxes to the person who shall propose to collect the same on terms most favorable to the town.

Held, that an agreement between two persons, each sending in distinct sealed proposals, that, if the collection should be awarded to either, both should share equally in the profits, if any, and contribute equally to the losses, was against public policy, and void. (*Id.*)

21. A and B being co-partners, A upon his individual credit obtains a loan from C of \$1,200, which is used in the partnership business, but credited to A personally on the partnership books, and so remains with A's knowledge and without any dissent on his part for five years; at the end of that time A and B enter into an agreement for the settlement of the partnership affairs, by which B among other things, agrees in one year to satisfy and discharge all the liabilities of the firm except those due A.

Held, that the loan of \$1,200 was personal to A, had that B was not obliged under the agreement to pay the amount to C. (*Gibbs* agt. *Bates*, 43 N. Y., 192.)

22. A contract executed by two parties and in the body of which a third person is also named as a party, who does not join in the execution of it, is nevertheless, on its face, good as against the parties executing it, and it rests upon either party denying its validity, to show that he was not bound by it, until it was also executed by such third person. (*Dillon* agt. *Anderson*, 43 N. Y., 232.)

23. It must appear that, at the time the contract was entered into, the party expressly declared its intention not to be bound by it until it was executed by the third person, or he can afterward set up the fact that the contract was not executed by such person as an objection to its validity against himself. In such case a party testifying in his own behalf, cannot swear whether or not it was his intent to make an individual contract. (*Id.*)

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24. Where, after a contract has been entered into between two parties, notice is given by one of them that the contract is rescinded on his part, he is liable for such damages and loss only as the other party has suffered by reason of such rescinding of the contract, and it is the duty of such other party upon receiving such notice, to save the former as far as it is in his power, all further damages, though the performance of this duty may call for affirmative action on his part. (*Id.*)

25. Where the defendant offered by letter to receive from the plaintiff and transport from New York to Chicago railroad iron, not to exceed a certain number of tons, during certain specified months, at a specified rate per ton, and the plaintiff answers merely assenting to the proposal, but does not agree on his part to deliver any iron for such transportation.

Held, that there was no valid contract binding on either party.

Held further, that it is incumbent upon a party to whom a contract is proposed by letter to signify his acceptance within a reasonable time, if he desires to take advantage of it, and that four months is not in general a reasonable time within which to do so. (*Chicago and Great Eastern R. Co. agt. Dane*, 43 N. Y., 240.)

26. Where an illegal contract has been fully executed, and money paid thereunder remains in the hands of a mere depositary, who holds the money for the use of one of the parties to the contract, an action brought to recover the money so held will be sustained. (*Woodworth agt. Bennett*, 43 N. Y., 273.)

27. Where, however, the recovery of the money requires the enforcement by the court of any of the unexecuted provisions of the illegal contract, no action can be maintained. (*Id.*)

28. A third person who receives money from one party to be paid to another (which payment could not have been enforced between the two parties on account of the illegality of the transaction between them), cannot interpose such illegality as a defence to an action brought against him to enforce payment. (*Id.*)

29. Accordingly, where four, one a State engineer, entered into an arrangement by which one of them was to bid for certain public work, and all to be jointly interested in the bid, and be-

fore the work was awarded they agreed to and did withdraw their claim to the work, and sold their bid for \$400 to a party who was a higher bidder for the same work, the purchaser giving his note for the amount, which was left with one of the four, with the understanding that, when paid, each of said persons should receive \$100, the note being subsequently paid to the person holding it.

Held, in an action brought by him against one of the parties to this agreement for goods, &c., that the \$100 retained by him from the proceeds of said note was not a good subject of counterclaim, it being necessary, in order to sustain such claim, to enforce a partnership or joint agreement entered into for the attainments of objects illegal and contrary to the statutes of the State. (Sess. Laws, 1854, chap. 329), which require that any proposal for work shall contain the names of parties interested therein, and prohibits any secret arrangement that any person not named in, or any engineer in the employ of the state, shall be interested therein, etc. (*Id.*)

13. The defendant undertook in writing with the plaintiff, in consideration that the latter would not arrest or imprison his debtor, L., in any action then brought or thereafter to be brought against him, that L. would at all times "obey and perform the orders and judgments of the court or courts, in which any such action was or might be pending, and of the judge and justices thereof." The plaintiffs having subsequently recovered and entered up judgments against L. for money, and directing the payment thereof, which judgments L. neglected to pay, brought his upon the defendant's agreement setting up these facts.

Held. (CHURCH, Ch. J., *contra*) on demurrer to the complaint, that the neglect to pay the judgments by L. was a refusal and failure to "obey and perform the judgment of the court," within the meaning of the contract, and the action would lie. (*Clafflin agt. Ball*, 43 N. Y., 481.)

11. A railway passenger assurance policy issued by the defendant insured the holder (plaintiff's intestate), in the sum of \$5,000 in the event of her death from personal injury, "when caused by any accident while travelling by public or private conveyances provided for the transportation of passengers." In the course of a journey by connecting steamboat and railway line, she fell upon a slippery sidewalk,

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while walking from the steamboat landing to the railway station, as was usual for travelers on that route, and thereby received injuries which caused her death.

Held, it appearing that she was so walking in the actual prosecution of her journey, that the death was covered by the terms of the policy, and that she was to be regarded as having received the injury while travelling by public conveyance. *It seems* that the fact that there were hacks by which the plaintiff's intestate might have ridden from the landing to the station did not affect the question, it being the general custom of the passengers to walk.

See CARRIERS. (*Id.*)

EMINENT DOMAIN. (*Id.*)

GUARANTY (*Id.*)

ADMIRALTY JURISDICTION. (*Id.*)

BILLS OF EXCHANGE. (*Id.*)

STATUTE OF FRAUDS. (*Id.*)

PUBLIC POLICY. (*Id.*)

PARTNERSHIP. (*Id.*)

15. An agreement to sell certain growing hops at so much per pound, and that they should be of first quality, held to intend harvesting and preparing the same for delivery as hops are usually prepared for marketing by weight. (*Warren* agt. *Winne*, 2 *Lansing*, 209.)

16. An agreement of December 28th, 1868, to sell real estate for a certain sum, and to take in payment therefor, in part a lease of a restaurant premises, and in part merchantable wines at the market price, to be delivered at intervals from such time as the vendor should commence the restaurant business, and for one year thereafter, as they should be required, not to exceed in value, \$250 at any one time; and, "on receiving such payments at the time and in the manner above mentioned" to deliver a deed, "which deed shall be delivered on the 31st day of December, 1868:

Held, not to be specifically enforceable in equity, as uncertain and impossible of execution. (*Mehl* agt. *Von Der Wulbeke*, 2 *Lansing*, 267.)

See ACCIDENT INSURANCE. (*Id.*)

BILLS OF EXCHANGE AND PROMISSORY NOTES. (*Id.*)

CONSIDERATION. (*Id.*)

COMMON CARRIER. (*Id.*)

CROPS. (*Id.*)

MISTAKE OF FACT. (*Id.*)

PRINCIPAL AND AGENT. (*Id.*)

POWER AND AUTHORITY. (*Id.*)

STATUTE OF FRAUDS. (*Id.*)

VENDOR AND PURCHASER OF LAND. (*Id.*)

CONVERSION.

1. The plaintiff's sheep broke out of the lot where they were grazing, and mingled with the sheep of the defendant, which were being driven along the highway, without any fault on the defendant's part. All he did was to allow them to go along the highway with his flock to his own premises where they could be conveniently yarded and separated. On arriving at the defendant's premises the plaintiff's sheep were separated, and turned into the highway and driven towards the place where they mingled with the defendant's flock:

Held, that upon these facts there was nothing to justify the conclusion that the defendant either unlawfully took the sheep in question, or converted them to his own use. (*Van Valkenburgh* agt. *Thayer*, 57 *Barb.*, 196.)

See STOCK. (58 *Barb.*)

CONVERSION OF PERSONAL PROPERTY.

See OWNERSHIP IN COMMON OF CHATTELS AND VENDOR AND PURCHASER OF LANDS. (2 *Lansing*.)

CORPORATIONS.

1. Where a sale was made by the treasurer of a corporation, and authorized by its by-laws to make such sale, but who was proved to have been in the habit of doing such business, with the knowledge and sanction of the company, and to have been in fact its sole managing agent:

Held, that the title passed by such sale. (*Phillips* agt. *Campbell*, 43 *N. Y.*, 271.)

See EXECUTORY BEQUESTS (*Id.*)

FOREIGN CORPORATIONS. (*Id.*)

LITERARY CORPORATIONS. (*Id.*)

MUNICIPAL CORPORATIONS. (*Id.*)

RELIGIOUS CORPORATIONS. (*Id.*)

2. Where, in an action against a foreign corporation, the corporation appears, by its attorney, and thus submits itself to the jurisdiction of the court, and by the result of the action of the court such corporation becomes the judgment debtor of the plaintiff in the action, this gives the court power over its property and rights of action within this state, and brings the corporation as much within the jurisdiction of the court as if it were a corporation under the laws of this state. (*De Bemer* agt. *Drew*, 57 *Barb.*, 438.)

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3. The fact that it is a foreign corporation does not relieve it from the status of being a "judgment debtor," nor from the provisions contained in 2d and 3d subdivisions of section 224 of the Code, relating to provisional "remedies," which apply, in general terms, to all judgment debtors; when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment. (*Id.*)
4. The statute, being general in its terms, embracing all "judgment debtors," it is but a fair and reasonable construction to be given to it as a remedial statute, that it includes all persons. Corporations are not excepted, in terms, and ought not to be in practice. (*Id.*)
5. In an action against stockholders of a corporation, brought by a creditor, to charge them individually with a debt of the corporation, a judgment obtained against the corporation is sufficient evidence of its indebtedness to charge the defendants, unless shown to have been obtained through collusion or fraud. (*Conklin* agt. *Furman*, 57 *Barb.*, 484.)
6. Where, by statute, stockholders are made liable for all the debts of a corporation, to an amount equal to the amount of stock held by them, they are so liable as partners, on the indebtedness, as original debtors, at the amount the contract with the company is completed. (*Id.*)
7. And although the statute contains a prohibition against suing the stockholders, *separately*, until a judgment has been obtained against the company, yet if it gives the right to a creditor to sue one or all of the stockholders *together* with the corporation, and on the recovery of a judgment against the corporation authorizes a judgment against the stockholders also, there is no period of time, after the debt is incurred by the company, when a cause of action does not exist against the stockholders; and if suit is not brought against them within six years, it will be barred by the statute of limitations. (*Id.*)
8. A judgment, free from fraud, recovered against a corporation, is conclusive evidence of the indebtedness of the corporation, in a subsequent action brought against a stockholder, or the trustees of the corporation; and the defendants in the latter action are bound by it, as fully as the corporation itself. (*Miller* agt. *White*, 57 *Barb.*, 504.)
9. When the trustees of a corporation are sued, there is no hardship in enforcing the rule. If a judgment against the corporation is unjustly obtained, they are guilty of a grave dereliction of duty if they fail to use the means provided by law to have the judgment reversed or vacated; and if they allow an unjust judgment to remain in force against the corporation whose interests they have undertaken to guard, they cannot complain when it is enforced against them personally. (*Id.*)
10. Where, in such action, the complaint alleged the recovery of a judgment against the corporation, and that the same was unpaid, in full force and owing to the plaintiff:
Held, that this was a sufficient statement of the indebtedness of the corporation to the plaintiff, without any averment as to the time when the original indebtedness was constructed, what it was for, or how much it was. (*Id.*)
11. The complaint in such an action need not state that the defendants were trustees of the corporation when the debt was contracted. For an omission to file the annual report required by the statute, the trustees are liable for all the debts of the corporations then existing. (*Id.*)
12. An allegation, in such a complaint, that the defendants failed to file any such report as is by law required to be filed within twenty days of January 1st in each year, is sufficient. (*Id.*)
13. The legislature may, in many ways, interfere with the actual administration of the affairs of a corporation without destroying its corporate existence, or impairing the powers of its managers or trustees. (*The People ex rel. The New Inebriate Asylum* agt. *Osborn*, 57 *Barb.* 663.)
14. Although, generally, where the property or effects of a corporation are seized or sequestered by virtue of statutes, in the exercise of the visitatorial power, the statutes themselves provide some mode of judicial proceeding for the purpose, such a provision is not essential to the validity of the statute. On the contrary, it is a well settled rule that where the legislature has the power to provide redress for either a public or private wrong, the remedy, or mode of redress, is wholly a subject of legislative discretion. (*Id.*)
15. The act of 1849 (p. 389, chapter 258,) providing for the prosecution of actions by or against "any joint stock company or association, consisting of seven or more shareholders or asso-

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ciates," in the name of its president, &c., did not, it seems, until extended by the act of 1851, (p. 833, chap. 455,) apply to associations wherein the members were not shareholders or stockholders. (*Kingsland agt. Braisted*, 2 *Lansing*, 17.)

16. The members liable, as such, of any "association composed of not less than seven persons, who are owners of, or have an interest in any property, right of action or demand, jointly or in common, or who may be liable to any action on account of such ownership or interest," are now under the provisions of the act of 1849, liable in a suit upon an indebtedness of such association, after judgment against it, and execution returned unsatisfied thereon. (*Id.*)

17. The statute preserved, but did not extend the right to enforce against such members a liability, as partners, which existed independently of it. (*Id.*)

18. In an action against the associates, after judgment and execution, returned *nulla bona* against the association (see laws 1853, p. 285,) the plaintiff is not entitled to recover costs of the original suit. (*Id.*)

19. The acts of 1849, (p. 389, chap. 258,) and 1851, (p. 833, chap. 455,) in relation to suits against joint stock companies and associations, were intended to apply to suits having in view a remedy against the "joint property and effects" of such companies and associations. (*Rork agt. Russell*, 2 *Lansing*, 244.)

20. When, therefore, an action merely seeks to restrain an unincorporated association by injunction, from carrying into effect its resolution of suspension against one of the members of the association, it is not within the meaning of said acts and is not well brought against the president of the association merely. (*Id.*)

See ASSESSMENT. (*Id.*)

ATTORNEY-GENERAL. (*Id.*)

CONTEMPT. (*Id.*)

INDICTMENT. (*Id.*)

PRACTICE. (*Id.*)

COSTS.

1. Where, at the close of the evidence on the trial, the court directed a verdict for the plaintiff, and ordered the action reserved for further consideration, with leave to the defendant to move for a new trial on a case to be made and settled in the usual manner; and without waiting for the de-

termination of the court upon the case reserved, and before any order directing judgment in the action, the defendant made and served a case, which was settled in the usual form, and thereupon, moved for a new trial on notice at a special term, held by the same judge who tried the cause, the plaintiff at the same time, moved for judgment on the verdict; and the motion for a new trial was denied, and judgment directed for plaintiff on the verdict:

Held, that the plaintiff was not entitled to costs:—Before argument on a case, for a new trial, \$20, and for argument of said case, \$40. (*Rouso agt. Vontriss*, ante, 8.)

2. The motion for a new trial, allowing the practice to be correct, was premature; as at the time it was made the trial of the action was not finished; the final determination was suspended until the further order of the court—a suspension the court had authority to make (*Code*, § 264). (*Id.*)

3. Until the further order of the court, no judgment could be entered, as it was undetermined who should have judgment. The hearing of the case reserved was part and parcel of the original trial, to which subd. 5 of section 307 of the Code has no application. (*Id.*)

4. If in fact the sum total of the accounts of the parties exceeds \$400, it is not necessary that the action be first brought in a justice's court, and that the amount of the accounts should be there shown by proof to exceed \$400. The jurisdiction of the justice's court may be shown by the pleadings. (*Lund agt. Broadhead*, ante, 146.)

5. Where the complaint alleged, substantially, that the plaintiff rendered labor and services to the defendants at agreed prices to the sum of \$450, and then admitted or alleged that the defendants have a counter-claim or set off to the plaintiff's account of \$409 13, leaving an amount due the plaintiff of \$40 87, which has not been paid. (*Id.*)

6. And the defendants in their answer admit all the material allegations in the complaint, except that they deny that they ever refused the plaintiff an accounting and settlement of the accounts, and allege that the plaintiff and defendants have had an accounting and settlement thereof, and that the balance as stated in the plaintiff's complaint, is still unpaid. (*Id.*)

7. And the referee, to whom the cause was submitted upon the pleadings—no other evidence being given, found that

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the account of the plaintiff exceeded the account of the defendants by the sum of \$40 87, and directed judgment for plaintiff accordingly; *held*, that the plaintiff was entitled to costs. (*Id.*)

8. The defendants, to avoid liability for costs, should have answered that they had paid the sums on account of the plaintiff's work, and not admitted that they had an account by way of set-off or counter-claim. (*Id.*)

9. Payments extinguish the claim or demand of the creditor *pro tanto*. (*Id.*)

10. The plaintiff, in an action on contract, before a justice of the peace, recovered \$135 78 damages and \$13 05 costs. The defendant appealed to the county court, and in his notice of appeal specified the following, amongst other particulars, in which he claimed the judgment should be more favorable to him:

"7th. The judgment should have been more favorable to the defendant in that damages should not have been so great by \$25."

"8th. Judgment should have been more favorable to defendant in that damages should have been not to exceed \$100, and should not have been more than \$75." (*Putnam* agt. *Heath*, ante, 262.)

11. In the county court the plaintiff had judgment for \$119 17 damages, being \$16 61 less than he recovered in the court below:

Held, that the plaintiff was entitled to costs. The statement in the appellant's notice of appeal is fatally defective. It is impossible for the respondent to know what sum the appellant is willing the judgment should be reduced, and it is this information he was bound to furnish by his notice—he should have named the *precise sum* to which the judgment should be reduced. (*The decision in the case of Gray* agt. *Hannah*. 30 *How.*, 156, not concurred in, as there the notice of appeal was that the judgment of the justice should have been for a sum not exceeding \$35.) (*Id.*)

12. All that the statute requires is that the modification desired should be clearly and precisely stated, and it matters not in what language the statement is clothed, if the requisite precision and certainty are obtained. (*Id.*)

13. An appeal from the decision of the clerk of the court, allowing or disallowing costs, cannot be sanctioned. The practice is becoming quite com-

mon, but it is wholly irregular and unauthorized. It would be treating the humblest ministerial action as judicial—converting the clerk of a court into a judge, without any color of authority for so doing. (*Bailey* agt. *Stone*, ante, 346.)

14. The only duty the clerk is required or permitted to perform, in relation to the costs, is to ascertain and determine what items of costs and disbursements the party presenting costs for adjustment is, by law, entitled to. The question whether he is entitled to any costs in the cause is for the court to determine, not the clerk. (*Id.*)

15. It is the duty of a clerk to adjust any bill of costs presented to him. But unless there is a verdict of a jury, report of a referee, or order of the court, awarding costs to the party presenting the bill to the clerk, it is not the duty of the clerk to insert the costs, so adjusted, in the judgment. (*Id.*)

16. If the party deems himself entitled to the costs in such case, it is his duty to apply to the court for an order requiring the clerk to insert the costs in the judgment. (*Id.*)

17. But if the clerk persists in inserting the costs in the judgment when there is no adjudication entitling the party to costs, the other party to the action must move to strike them from the judgment. (*Id.*)

18. After an adjudication by a justice of the peace that the accounts of the parties exceeds \$100, the plaintiff is bound to commence his action in the supreme court, and is entitled to costs under § 304 of the Code, on the recovery of any amount in that court. (*Id.*)

19. Where several plaintiffs unite in bringing an action against the defendant to recover damages which accrued to them severally, and on the trial the defendant succeeds and has a verdict against four of the plaintiffs—the remainder of the plaintiffs recovering against the defendant—and the defendant enters judgment for costs against two only of the plaintiffs against whom he obtained verdict, the defendant is entitled to costs against the four plaintiffs. (*Knowlton* agt. *Pierce*, ante, 361.)

20. If the two plaintiffs against whom costs are inserted in the record of judgment, desire to compel the defendant to enter judgment against all the plaintiffs against whom the verdict was rendered, they must apply to the court for that relief. They cannot, on motion,

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set aside the judgment for irregularity on that ground. (*Id.*)

21. Where the evidence on the trial presents a question of fact for the referee to decide, his finding on such fact must be held conclusive on the parties. (*Barker agt. White, ante, 504.*)

22. Where the action is in equity, the giving or withholding of costs is in the discretion of the referee. As a general rule the court will not attempt to control that discretion on appeal. Certainly not except in case of its palpable abuse. (*Id.*)

23. The plaintiff having failed in the action on the principal subject of litigation; recovering however on one minor branch of it, was allowed his costs of action, excepting two thirds of the disbursements, and was charged with the costs of one of the defendants defense. (*Id.*)

Held, that the adjustment of the costs was not so unfair and inequitable as to require this court to interfere with the decision of the referee. (*Id.*)

24. Costs in equity suits, even against executors, are within the discretion of the court. (*Van Riper agt. Poppenhausen, 43 N. Y., 68.*)

25. When the issues in an action of foreclosure are referred, the referee is charged with the duty of making a decision on the question of costs. (*Stevens agt. Veriane, 2 Lansing, 90.*)

See CORPORATION. (Id.)

EXECUTORS AND ADMINISTRATORS. (*Id.*)

PAUPER. (*Id.*)

COUNTER-CLAIM.

1. In an action for unlawfully and wrongfully taking and carrying away certain goods, chattels, household furniture, wearing apparel and jewelry, the property of the plaintiffs, of the value of \$4,170, and that the defendant converted and disposed of the same to his own use, to plaintiffs' damage, \$5,000. And the answer of the defendant contains specific denials, putting in issue every material allegation of the complaint, and also a counter-claim for the recovery of \$350, damages alleged to have been sustained by the defendant by reason of the plaintiffs making default in the performance of the condition contained in a chattel mortgage, executed by the plaintiffs to the defendant upon said property, and the defendant, thereupon, took possession of so

much of the property as he could find, but plaintiffs had before that time, sequestered and removed a part thereof, which could not be found; that it was subsequently discovered that the plaintiffs had no title to a part of the property taken by the defendant, although included in the mortgage, and the same was replevied and taken from the possession of the defendant by the true owners thereof, whereby the defendant sustained loss to the amount of \$350, for which amount he demands judgment against the plaintiffs:

Held, that this counter-claim is not connected with the trespass upon which the plaintiffs rely, nor can it be claimed that it arose out of the transaction set forth in the complaint, and that it cannot be upheld, without a great stretch of the meaning of the words "subject of the action," beyond their true and proper significance. (*Chamoret agt. Cagney, ante, 125.*)

2. *It seems*, that under subdivision 1 of section 150 of the Code, a counter-claim may be interposed in an action for a tort, provided such counter-claim arises out of the transaction set forth in the complaint as the foundation of plaintiffs' claim, or is connected with the subject of the action. (*We think that this dictum cannot be sustained on authority, but on the contrary the authorities that bear on the question are decidedly adverse to this view.—REP. (Id.)*)

3. When the plaintiff is to transport a cargo to be delivered to him by the defendant from Rochester to New York, by way of the canal, and the plaintiff's boat, being frozen up in the canal on its passage, is injured by measures taken by the defendant to preserve the cargo:

Held, in the action brought by the plaintiff against defendant for the injuries so done to his vessel, that evidence of a counter-claim, existing in favor of defendant against plaintiff, for damages occasioned to the cargo by the alleged improper delay of the plaintiff in prosecuting his voyage, was admissible, and that its rejection was error, there being conflicting evidence as to whether there had been such improper delay. (*Starbird agt. Barrons, 43 N. Y., 200.*)

See EQUITABLE SETT-OFF. (Id.)

PROMISSORY NOTES. (58 *Barb.*)

COUNTY CLERK.

1. The contracts of a county clerk, in the name of the county, for the printing

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necessary and proper to enable him to perform the duties of his office, are binding upon the county. (*The People ex rel. Kinney agt. The Board of Supervisors of Cortland County*, 58 Barb., 139.)

COUNTY COURT.

1. A county court has jurisdiction of an action to foreclose a mortgage, which contains, in addition to the premises described and situated in its own county, lands described and situated in another county. (*Strong agt. Eighme, ante*, 117.)
2. A county court must be held at the place appointed by law. In matters requiring notice, the county judge cannot hold an adjourned court at his chambers. (*Bennett agt. Cooper*, 57 Barb., 642.)
3. Where a county judge adjourned the court to his chambers, and there heard all the proceedings for the discharge of an insolvent, and granted the discharge:

Held, that the same was void. (*Id.*)

See APPEAL. (58 Barb.)

APPEAL (2 Lansing.)

INSOLVENT DEBTOR. (*Id.*)

COUNTY JUDGE.

See MUNICIPAL CORPORATIONS. (57 Barb.)

COUNTY POOR.

See PAUPER. (2 Lansing.)

COUNTY TREASURER.

1. The compensation to a county treasurer, where the board of supervisors have omitted to fix it otherwise, is one half of one per cent. for receiving, and one half of one per cent. for disbursing moneys, until the commissions come up to \$500; which sum they cannot exceed, except in those counties where other compensations are fixed by law. (*The Board of Supervisors of the County of Otsego agt. Hendryx*, 58 Barb., 279.)
2. In the absence of any act or resolution of the board of supervisors, fixing the compensation of the county treasurer therefor, he is entitled to a commission of one per cent. for receiving and disbursing moneys, between the time of

the settlement of his account, for the previous year, with the board, in November, and the expiration of his term of office on the 1st of January, thereafter. (*Id.*)

COVENANTS

1. The provisions of the Revised Statutes (1 R. S., 730), that no covenant shall be implied in any conveyance of real estate, whether such conveyance contains special covenants or not, do not apply to leases for years; but in such cases a covenant for quiet enjoyment is ordinarily implied. (*Burr agt. Stenton*, 43 N. Y., 462.)
2. But where a lease contains an express covenant for quiet enjoyment *without molestation or disturbance from the lessor, his successors or assigns*, no other or further covenant in respect to enjoyment will be implied. (*Id.*)

See WARRANTY. (58 Barb.)

EASEMENT (2 Lansing.)

CREDITORS.

See LIEN. (58 Barb.)

PRACTICE. (2 Lansing.)

CREDITORS ACTION.

1. An action by a general assignee of an insolvent debtor, to have declared, an assignment of a lease of real estate, absolute on its face, made by the debtor to the defendants, a mortgage, as security for money loaned to the debtor and to redeem the premises therefrom, and upon the trial the court decree that the assignment is a security in the nature of a mortgage, and that the plaintiff, on payment of a certain sum of money to the defendants within a certain time the defendants should reassign the lease, but in default of such payment within the time the plaintiff's complaint was to stand dismissed out of court, and the plaintiff, neglects to pay the money and does not in any respect, comply with the terms of the decree:—Such an action and decree is *no bar* to a subsequent action brought by a receiver in supplementary proceedings of the debtor, to reach his interest in the property leased and to get the benefit of the decree in the hands of an assignee, claiming as owner absolute by an assignment of the lease and the decree from the original defendant, with the consent of the plaintiff in the first suit. (*Bolles agt. Duff, ante*, 355.)

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2. The main purpose of the first suit was not merely to *redeem*, but to have the assignment of the lease adjudged to be merely a mortgage; therefore, the failure of the plaintiff in that suit to pay the sum decreed to be due, within the time allowed, and a dismissal of the complaint, did not operate as a strict foreclosure, and a forfeiture of the estate. (*Id.*)
 3. Besides, the time allowed to a party to pay the amount accrued to be due on a bill to redeem is usually six months; in this case it was limited to two months, and to pay the large sum of \$26,240 97. (*Id.*)
 4. Again, if the claimant of the property as assignee of the original defendants, insists upon this forfeiture he must show that the decree clearly gives it to him; and it seems that there never was, in this case, any *final order* (on proof of the fact that there had been no payment,) that the complaint should stand dismissed. This final order is necessary in a strict foreclosure implied from a dismissal of a bill to redeem; until that order is obtained the records of the court do not show which party has finally obtained the judgment or who is the owner of the land; and until that order is obtained the complainant may apply to have the time to pay the amount decreed to be due, extended. (*Id.*)
- his omission to object, could waive the illegality. (*Id.*)
4. The proof of exclusive possession by the prisoner recently after the theft, of the whole or some part of the stolen property, is sufficient when standing alone, to throw upon him the burden of showing how he came by it, and if he fails to do so, warrants the jury in convicting him of larceny. And if the property was shown to have been taken by burglary or robbery, such possession unexplained is sufficient also to warrant a conviction of those crimes. (*Knickerbocker agt. People, 43 N. Y. 177.*)
- See ARREST OF JUDGMENT. (*Id.*)
 EVIDENCE. (*Id.*)
 JURY. (*Id.*)
 LARCENY. (*Id.*)
 PLEADING. (*Id.*)
5. Where a person has been guilty of a burglary and a larceny at the same time, he may be indicted for either the burglary or the larceny separately, and convicted of the offense charged. (*The People agt. Smith, 57 Barb. 46.*)
 6. There is no merger in such a case which is available to the accused by way of defense, until there has been a trial and conviction for the greater offense.
 7. Burglary and larceny charged in the same indictment as having been committed on the same occasion is a compound offense, and upon the trial the party accused may be convicted of either one without the other. (*Id.*)
 8. If there has been a conviction for the burglary, a plea of *autre fois convict* would be a good answer and defense to a subsequent indictment for the larceny which was committed the same time and by means of the burglary. It is all the same felony and the lesser is merged and satisfied in the conviction and punishment of the greater. (*Id.*)
 9. So, a conviction for the larceny which was committed by means of the burglary, will constitute a bar to any subsequent trial and conviction of the defendant for the offense of the burglary. (*Id.*)
 10. There cannot be two convictions for separate acts constituting the same felony. If it is all the same felony one conviction is a bar to any other for the offense of whatever degree. (*Id.*)
 11. On the trial of an indictment for larceny in stealing "promissory notes,"

CRIMINAL LAW.

1. All instructions or information given by the court to the jury, having a tendency to influence the verdict, are a part of the trial, within the provisions (2 R. S., 759, § 13), that no person indicted or felony can be tried, unless he be personally present during such trial (*Maurer agt. People, 43 N. Y., 1.*)
2. Accordingly, where the plaintiff in error having been indicted, and being on his trial for murder, after the jury had retired to deliberate upon their verdict, they returned into court and asked certain questions of the court as to what had been the evidence on particular points, to which the court replied.

Held, that this was a proceeding upon the trial within the statute, and the prisoner not having been present, it was error, for which his conviction must be reversed.

3. *Held* further, that neither the presence of the prisoner's counsel, nor

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a witness testified that the bills stolen were of the currency ordinarily known as greenbacks."

Held, that this proof was some evidence, at least, of their genuineness, and when taken in conjunction with the further fact, to which he testified, that they were of the denomination of one hundred dollar bills of that currency, there was enough evidence also of the value to sustain a conviction. (*Remsen* agt. *The People*, 57 Barb., 324.)

12. Where the judge on such a trial, charged the jury that good character should not shield the prisoners, if from all the testimony (which of course included that upon the subject of character) the jury believed them to be guilty; that they were to consider all the evidence, and where they had a well reasoned doubt arising out of *all the testimony*, good character should protect the prisoners, and should insure their acquittal, if the jury had "any reasonable doubt arising out of the testimony."

Held, that the charge should be all taken together, and so taken, it could not have misled the jury. (*Id.*)

13. In the impannelling of a jury in a criminal case, one of the jurors was asked "if he had formed an opinion as to the general character of the prisoner?" He replied that he had; that "his general character was bad;" and that "he (the juror) was biased."

Held, that these admissions rendered the jury incompetent. INGRAHAM, P. J. dissented. (*Allen* agt. *The People*, 57 Barb., 338.)

14. Whatever objection there may have been under the English system, to two grand juries sitting in the same county at the same time the C. de has relieved the difficulty. The 20th section directs that the courts of oyer and terminer shall be held twice annually in every county, and as many more terms as the judges shall appoint. The 23d section provides for extra courts to be appointed by the governor, and the 24th section provides for the adjournment of any court to a future day. The holding of one branch of the court does not prevent the holding of the regular courts as provided by the statute. Per INGRAHAM, P. J. (*Id.*)

15. It is not a valid objection to a writ of error to remove a case from a court of sessions, that it does not require a return of the judgment below, or a return of the proceedings on the indictment "if judgment be thereupon given."

(*Phillips* agt. *The People*, 57 Barb., 353-)

16. Nor is it a ground of objection to the hearing of the case, in the Supreme Court, upon the writ of error, that there is no return of any record of judgment. (*Id.*)

17. It is sufficient if the writ in terms commands that the record and proceedings (which include the judgment, if any be given) be certified to the Supreme Court, and the answer of the court of sessions sets forth the indictment, the trial, the exceptions, the findings of the jury, and the judgment of the court thereon.

18. A declaration or admission if made before the accused is conscious of being charged with or suspected of the crime, is admissible in evidence under all circumstances, however made or obtained; under oath or without, upon a judicial proceeding or otherwise. But if made afterwards, the law at once becomes cautious and hesitating. The true inquiry then is, was it voluntary? For unless it is entirely voluntary, it is held to be not admissible. Per POTTER, J. (*Id.*)

19. By *voluntary* is meant proceeding from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous disturbance.

20. Where the accused while under arrest for stealing a horse was told by the complainant, and again, in substance, by the officer, that "*the best he (the accused) could do was to own it up; that this would be better for him.*"

Held, that a confession made under this advantage, if he confessed, was not a voluntary confession. (*Id.*)

21. On the trial of an indictment for stealing a horse, it is erroneous to admit evidence of the accused taking a wagon, on the same night, from another person. The taking of a wagon to use with the stolen horse, if they were used together, is a corroborating circumstance to the main charge, and can be used as evidence for that purpose; notwithstanding it is proof of another felony, also, not charged in the indictment. (*Id.*)

22. An indictment for a misdemeanor in voting at a general election, after the accused had been convicted of a felony, need not allege that the defendant voted *knowingly, willfully and corruptly*; those words not being contained in the statute. It is sufficient

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- if the indictment follows the language of the statute. And if the offense is well set forth without these words, they are surplusage, and need not be proved. (*Hamilton agt. The People, 57 Barb., 625.*)
23. The insertion of those words in the indictment does not prejudice the defendant, and is cured by the statute of jeofails. (2 *R. S.*, 728, § 54, *sub.* 4.)
24. The word "unlawfully" is all that is necessary to characterize the offense in the indictment. All beyond that is surplusage. (*Id.*)
25. Where the prosecutor offers no proof on his part to show that the act charged was willful or corrupt, beyond proving the fact of voting by the defendant, and his conviction no proof is necessary, on the part of the accused, to show the absence of willfulness or corruption. (*Id.*)
26. The defendant, on the trial of such an indictment, for the purpose of rebutting the allegation in the indictment, that he voted knowingly, willfully and corruptly, offered to prove that previous to his offering to vote, the Governor, on being applied to for a pardon, had written a letter to the effect that the defendant would need no pardon for the previous offense, he being a minor; and that upon coming of age, he would be entitled to all the rights of a citizen; also that he stated his case to two counsellors of the Supreme Court, and was advised by them that rights, including the right of voting, which he had never possessed, could not be taken away from him; that of such rights he was not deprived by the conviction; and that, on his coming of age, he would be a citizen, and have a perfect right to vote. The names of the counsel were not given, nor did the defendant, in his offer, allege that he believed such advice.
- Held*, that the offer must be deemed equivalent to an offer to prove an ignorance of the law by the defendant's and that it was not broad enough to meet the case. That it was immaterial and was correctly overruled, because it did not negative the idea, even that the defendant *knowingly and unlawfully* voted. (*Id.*)
27. Every man is bound to know the law; and ignorance of the law is no defense. And every person is bound to know in law that while standing as a convicted felon unpardoned the statute forbids him to vote. (*Id.*)
28. On the trial of an indictment, the accused cannot be allowed to show, in his defense, an absence of *intent* to commit the offense charged, by proving that he acted under advice of counsel and others; especially where he does not allege that he believed or relied upon such advice. (*Id.*)
29. The objection that the offense charged in the indictment, viz., that the accused did the act charged *knowingly, willfully and corruptly*, was not proved, applies only to a class of cases where *guilty knowledge* is a part of the definition of the offense, and is the material fact to be proved. (*Id.*)
30. Whenever a prisoner on trial puts his general character in issue by his own act, he takes the risk of its being proved bad, and of every presumption which such proof legitimately raises against him. (*Burdick agt. The People, 58 Barb., 51.*)
31. And so, where a prisoner, upon trial on an indictment for a felony, avails himself of the privilege granted by the statute of 1869, (*Laws of 1869, ch. 678*), of testifying as a witness in his own favor, he necessarily puts his general character and credibility, as a witness in issue, and makes it the proper subject of evidence on that question. (*Id.*)
32. When he makes himself a witness, he becomes subject to all the rules applicable to other witnesses, notwithstanding his other character, of a party on trial for a felony. (*Id.*)
33. The statute which allows a prisoner upon a trial for a crime, to become a witness in his own behalf, at his own election, does not protect him from being impeached, the same as any other witness. (*Id.*)
34. Where, upon a trial for murder, the question raised by the prisoner's testimony was, whether, situated as he was, there was reasonable ground for an apprehension, on his part, of a design on the part of the deceased, to do him, the prisoner, some great personal injury, and to believe there was imminent danger of his design being accomplished; and the judge charged, as matter of law, that the homicide was not justifiable, even if the jury believed the facts and circumstances at the time, and before, the firing of the pistol which produced it, were as stated by the prisoner in his testimony.
- Held*, that the question was clearly a

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question of fact for the jury, and not a question of law for the court; and that the charges was erroneous because it took the question from the jury, entirely. (*Id.*)

See ARSON. (2 *Lansing.*)

EVIDENCE (*Id.*)

INDICTMENT. (*Id.*)

JURY AND JURY TRIAL. (*Id.*)

CROPS.

1. An agreement for the cultivation of a farm on shares, dated March, 1866, provided that the defendant's assignors should "have one third of all the crops grown upon the above mentioned farm for one year;" with no other specification respecting the term:

Held, such construction, according with the apparent intention of the parties to the agreement as indicated by their subsequent acts, that the defendant was entitled to a third of wheat sown by him in the fall of 1866, which matured in the summer of 1867. (*Armstrong* agt. *Bicknell*, 2 *Lansing*, 216.)

See MONEY HAD AND RECEIVED. (*Id.*)

CROSS EXAMINATION.

See WITNESS. (43 *N. Y.*)

WITNESS. (2 *Lansing.*)

D.

DAMAGES.

See EMINENT DOMAIN. (43 *N. Y.*)

RESCISSION. (*Id.*)

AGREEMENT. (57 *Barb.*)

AMENDMENT. (*Id.*)

BOND. (*Id.*)

1. Where the evidence tended to prove a severe, and probable permanent, injury to the plaintiff's hand and wrist, arising from the defendant's negligence:

Held, that a verdict for \$2,500 ought not to be set aside on the ground that the damages were excessive. (*Maloy* agt. *The New York Central Railroad Company*, 58 *Barb.*, 182.)

See CARRIERS (*Id.*)

HUSBAND AND WIFE. (*Id.*)

WATER. (*Id.*)

EVIDENCE (2 *Lansing.*)

STATUTE OF FRAUDS. (*Id.*)

DEBTOR AND CREDITOR.

- 1 Where the plaintiff, a foreign corpora-

tion, brought an action against one of its stockholders to recover an installment due on stock, subscribed for by him, and the only defence relied on was, that a creditor of the plaintiff had obtained a judgment against it; and on proceedings supplementary to the execution thereon, an order had been made restraining the defendant from paying the debt, a receiver had been appointed and had duly qualified in such proceedings, though no demand was ever made by such receiver upon the defendant for the said debt:

Held, that the plaintiff was entitled to recover, and that the defendant could have taken the order of the court directing the payment by him of the amount of the debt which would have protected him in such payment. (*Glenville Woolen Co.* agt. *Ripley*, 43 *N. Y.*, 206.)

See APPROPRIATION OF PAYMENT. (*Id.*)

PAYMENT. (*Id.*)

2. Although one may have intended to defraud the creditors of another by taking and converting his property into cash, such intention will be rendered harmless by his delivering the proceeds of the sale to the debtor, or his wife who is his authorized agent. (*Cramer* agt. *Blood*, 57 *Barb.*, 155.)
3. And if he subsequently receives a portion of such proceeds, with like intent, from the debtor's agent, for the use of the debtor and his wife, and to be handed over to them, or for their use, as they may want, such intent will be rendered harmless by his paying over the money to creditors, or to the debtor, or his wife, by his directions. (*Id.*)
4. A settlement between such person and the debtor, and payment of the amount due for such property, or its proceeds, will discharge the former, from any liability to creditors of the owner who subsequently obtain judgments against the latter. (*Id.*)
5. A creditor at large of another is not in a situation to question the *bona fides* of the debtor's property, or the right of a third person to take such property, or his right to retain the proceeds of its sale. (*Id.*)
6. The statute in relation to conveyances of a debtor's property with the intent to delay, hinder and defraud his creditors, has no application to a fraudulent transfer of such property by any one except the debtor; and no one can avail himself of the statute except a creditor who is hindered, delayed or defrauded thereby. A creditor at large

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cannot be hindered by such transfer, within the purview of the statute. (*Id.*)

7. Where the cause of action set out in the complaint was that the defendant had in his possession either the property of the plaintiff's judgment debtor, or its proceeds, for which he had never accounted, and the referee found that before the plaintiff's judgment was rendered, the defendant had fully accounted with the debtor for all the property, and proceeds of property in his possession:

Held, that the referee should have granted a nonsuit. (*Id.*)

8. As a general rule, remedies upon the primary debt and upon the collateral security may be prosecuted at the same time, even to judgment and execution though only one satisfaction can be obtained. (*The Corn Exchange Ins. Co. agt. Babcock*, 57 Barb., 231.)
9. If an attempt be made to collect the judgment both upon the original and the collateral security, that can always be prevented, or remedied, by the order of the court. (*Id.*)
10. There is no legal objection to pursuing remedies upon the primary and the collateral security simultaneously. Nor is it an effectual bar to the obtaining of a judgment upon the original demand, that the suit upon the collateral has been first put in judgment, and that one of the defendants in that judgment is the sole defendant in the action upon the original claim. (*Id.*)
11. The true test is, has satisfaction been had? If so, all other proceedings will be stayed; if not, they will be allowed to be continued. (*Id.*)
12. Where debtors, immediately before making an assignment for the benefit of creditors, bought merchandise which they did not intend to pay for, but which they sold on credit, and assigned the debt owing for the price to the assignee; and at the time of making the agreement retained a large amount of money from the assignee, for their own use; and allowed money to be retained by clerks, fraudulently, either for their own use or for the benefit of the assignors:

Held, that these facts, unexplained by the debtors, were amply sufficient to warrant a finding that the assignors were actuated by a fraudulent intent in making the assignment; and that in the absence of any proof explaining the presumption of fraud arising from such acts, it was the duty of the court below

to have so found. (*The Waverly National Bank agt. Halsey*, 57 Barb., 249.)

13. Mere delay by a creditor in entering judgment, or issuing an execution, is not sufficient to warrant any finding of collusion, so as to defeat a purchase made by the judgment creditor at a sheriff's sale under the execution. (*Devoe agt. Brandt*, 58 Barb., 493.)

14. A judgment creditor, after instituting proceedings supplementary to execution, against his debtor, may abandon such proceedings, and commence an action in his own name, to set aside assignments of a bond and mortgage, by the debtor and his assignee, as without consideration and fraudulent and void as to him, instead of proceeding in the name of a receiver appointed under section 299 of the Code. (*Bennett agt. McGuire*, 43 Barb., 625.)

15. Conceding that where a receiver has been actually appointed, the action should be brought by him, such is not the rule in all cases. The principle authorizing a receiver to sue in certain cases is not the way of an action by a judgment creditor, in the nature of a creditor's bill, for the purpose of having an assignment or other disposition of property by the debtor declared fraudulent, and the property applied to the satisfaction of the judgment. (*Id.*)

See EVIDENCE. (*Id.*)

PROMISSORY NOTES. (*Id.*)

DECEIT.

See FRAUD. (57 Barb.)

1. The very gist of the action for deceit is the fraudulent intent with which the representation is made; and that intent is not established by proof merely of the falsity of the representation; but knowledge, when it was made, by the party making it, that it was false, must be shown. (*Robinson agt. Flint*, 58 Barb., 100.)
2. Where all the information possessed by the party making a representation was obtained from others, and there was nothing to show that he did not believe, or had not the right to believe, in the truthfulness of the information he had received:

Held, that no action would lie against him to recover damages for false representations. (*Id.*)

DECISION BY JUDGE.

See PRACTICE. (2 Lansing.)

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DECLARATIONS.

See CRIMINAL LAW. (57 Barb.)
EVIDENCE. (*Id.*)

DEED.

1. An objection to a deed that it is not stamped as required by the act of congress, is unavailing, unless the party objecting proves that the omission of stamps was with intent to evade the statute. The proof lies with him. (*Cagger agt. Lansing, 57 Barb., 421.*)
5. The effect of a deed delivered as an escrow as a conveyance, and its effect as being the written evidence of a contract between the parties to avoid the statute of frauds, should not be confounded. The questions are not identical. Per POTTER, J. (*Id.*)
3. There is nothing in the statute or common law that prevents a party claiming title to lands from purchasing in outstanding claims of other persons, to quiet his own title; and the deed, release or quit-claim of the outstanding claim is not void; it will have the effect, at least, to quiet the claim of title of the person executing it. (*Marble agt. McMinn, 2 Lansing, 610.*)
4. The taking of such a deed is not an acknowledgment that the grantee has no other title. (*Id.*)

See AGREEMENT. (*Id.*)
EVIDENCE. (*Id.*)
REAL ESTATE. (*Id.*)
WARRANTY. (58 Barb.)

5. In 1849 the owners of certain agricultural lands built an embankment thereon as a highway, and also to dam a stream running through the premises, and thereby create a reservoir to supply water by means of a culvert under the embankment, to a mill further down the course of the stream, occupied under them by one B. In March, 1850, the owners conveyed to B the mill premises, with the privilege of using the "reservoir dam," and in June of the same year contracted with him to sell and convey, with possession until conveyance, other premises lying along the bank between the mill site and the down stream side of the culvert. B took possession of, and in 1852 built a new mill on the premises described in the contract, which he operated with the said owner's knowledge, by water supplied from the reservoir through the culvert by means of wooden flume therefrom, and soon after abandoned the use of the old mill. In 1853, while the new mill was so in op-

eration, the said owners conveyed the premises described in their contract with B, together "with the appurtenances," to his assignee, with covenants of warranty, and in 1857 they conveyed the land covered by the reservoir to the defendant C.

- Held*, that a right to use the waters from the reservoir, passed by the grant to B's assignee, and C was perpetually restrained, in a suit against him, and the commissioners of highways brought by one having title, through such assignee, from destroying the reservoir, and diminishing the supply of the water, or interfering with its flow upon the plaintiff's premises. (*Simmons agt. Cloonan, 2 Lansing, 346.*)
6. Nor can C claim an appeal in such suit, authority from the commissioners of highways, to interfere with the plaintiff's rights in the reservoir, he having interposed as a defense a personal right, no separate motion having been made for non-suit, etc., at the trial on behalf the commissioners, and no evidence having been given of steps taken by the commissioners as such, respecting such interference. (*Id.*)

See DEFENSES. (*Id.*)
EASEMENT. (*Id.*)
MORTGAGE OF LAND. (*Id.*)

DEFENSE ARISING PENDENTE LITE.

See RECEIVER. (43 N. Y.)

DEFENSES.

1. In an action for trespass for entering and cutting standing timber, the defendant may interpose as a defense, a right as the equitable owner of the timber. (*Carpenter agt. Otley, 2 Lansing, 451.*)
2. A deed of timbered land, with covenants against the grantor's acts, was made and delivered to the plaintiff who paid for the land only, and promised without writing to convey the timber with the right to enter and cut the same to one with whom the grantor had an unwritten contract for its sale, and who afterwards paid the latter for the same.
Held, that the grantor's vendee of the timber was the equitable owner thereof, and not liable to the plaintiff who had refused performance of the unwritten promise, for entering under such promise, and cutting the timber. (*Id.*)
3. The plaintiff having acted by an agent

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in negotiating the purchase, and in taking the conveyance.

Held, that the arrangements made by such agent upon delivery of the deed, and after the contract of the sale for the taking of the timber, were adopted by the plaintiff on acceptance of the deed, and became part of the *res gestæ*. (*Id.*)

4. *Held* further, that evidence of the agreement in respect to reservation of the timber, and for its conveyance by the plaintiff, did not tend to vary or contradict the covenants of the deed. (*Id.*)

5. And that the plaintiff was estopped from setting up the statute of frauds. (*Id.*)

See ASSIGNMENT OF MORTGAGE. (*Id.*)
BILLS OF EXCHANGE. (*Id.*)
POLICY OF INSURANCE. (*Id.*)

DELAY.

1. The neglect to serve on *infant defendants* in a mortgage foreclosure case, copies of an *amended complaint*, is a great irregularity. But where too much time has elapsed and too many innocent parties are interested, the judgment will not be disturbed on that ground. (*McMurray* agt. *McMurray*, *ante*, 41.)

2. The want of appointment of a *guardian ad litem* for infant defendants in such a case, renders the judgment of foreclosure *erroneous*; and it may be set aside, on motion, as a matter of right. (*Id.*)

3. But where the infant defendants could severally have moved to set aside the judgment as soon as they came of age, but delayed respectively about nine, seven and four years, *held*, that innocent parties ought not to suffer by the delay. Motion denied, without prejudice to the right of the moving parties to bring an action of ejectment, or by an action to redeem, in order to test their claim to set aside the judgment of foreclosure as being absolutely *void*. (*Id.*)

DELIVERY.

1. To constitute a delivery of gold on a contract for the delivery thereof, so as to put it at the risk of the purchaser, everything must be done by the vendor that would be necessary to be done to discharge a debt, payable in gold, due from him to such purchaser. (*Kinney* agt. *Ford*, 43 N. Y., 587.)

2. It is not enough that he should place it on the counter or desk, where gold was customarily placed when delivered to the purchaser, at such a time and in such a manner that the purchaser's agent might have seen and obtained possession of it; but to make a good delivery, the property must be put into the actual possession and control of the purchaser or his agent; and where the purchaser's agent is actually present at the place of delivery, it is the duty of the vendor to place the property in his "conscious" possession. (*Id.*)

3. Accordingly, a deposit by the vendor (plaintiff) of a gold check upon the purchaser's (defendants) counter, in the presence of his agent to receive such checks, but without bringing the fact of such deposit to the knowledge of such agent, is not a sufficient delivery to put the property at the risk of the purchaser; and a charge of the court to the jury that the check was to be deemed at the risk of the purchaser, if placed in the usual place of receiving such checks by him, under circumstances enabling his agent in that business to have learned, by directing his attention to the matter, that the check was there, although at the moment such agent was occupied with other business; and that it was not necessary to the delivery that the attention of the agent should be actually drawn to the check by the vendor. *Held*, erroneous. (*Id.*)

4. The owner of a trunk sent it to the defendant's railroad depot by an expressman who placed it in the depot beside the baggage grate, which was locked, and upon inquiring of persons there, engaged in handling freight was referred to the ticket agent as the person who took charge of the baggage; he went to the ticket agent's office, and told him that there was a trunk outside; the agent said it was right, and immediately sent two men to take care of it. When the owner inquired for his trunk on purchasing his ticket later in the day, it could not be found, though the ticket agent said he had seen one a short time before answering to its description. Employees of the defendant also said it had been delivered upon the presentation of a check. In an action to recover the value of the trunk and its contents,

Held, that there was sufficient evidence of delivery, and a non suit was wrong. (*Rogers* agt. *Long Island R. R. Co.*, 2 Lansing, 269.)

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5. *Grosvenor* agt. *The N. Y. Central R. Co.* (39 *N. Y.*, 34), distinguished. (*Id.*)

See **BILLS OF EXCHANGE AND PROMISSORY NOTES.** (*Id.*)

DEMAND.

1. It is the duty of one who has received money to the use of another to pay it over, and no demand is necessary by the latter before the action. (*Howard* agt. *France*, 43 *N. Y.*, 593)
2. A party having money of another in his hands, his denial of the owner's right, and stoppage of the payment of his check for the amount which has come to the possession of such owner, are equivalent to demand and refusal. (*Id.*)

See **CONTRACT.** (*Id.*)

DEMURRAGE.

1. An intermediate consignee, having no interest or ownership in the property, held not to be liable for demurrage on account of the unreasonable delay in unloading at Buffalo. (*Dart* agt. *Ensing*, 2 *Lansing*, 383.)

DEMURRER.

1. A demurrer to a pleading admits all the material facts stated in that pleading, but alleges that those facts in law do not constitute a cause of action or defense, as the case may be. (*Groesbeck* agt. *Duncomb*, ante, 302.)
2. A demurrer admits all the allegations, but it admits nothing but what is material and well pleaded, and it is only a technical admission, and does not involve a confession. Conclusions of law are never admitted by a demurrer. (*Id.*)

See **CONTRACT.** (43 *N. Y.*)

DEPUTY SHERIFF.

See **SHERIFF.** (43 *N. Y.*)

DESCENT.

1. On the 26th of October, 1848, B. M. died intestate, seized in fee of certain premises, leaving no widow or descendants him surviving, but leaving a sister M. C., and a grand-nephew A. M. W., his only heirs at law. M. C. and A. M. W. inherited the lands, as tenants in common, in fee, and after-

wards made an amicable partition, by which the premises fell to the share of A. M. W., and a release of the same was made to him, by M. C. dated May 15, 1849. A. M. W. died November 22, 1849, seized in fee of his portion of said lands, intestate, unmarried and without descendants, and leaving no father, but leaving a mother, M. H. who, after the death of her first husband, the father of A. M. W., and during the lifetime of A. M. W., had married a second husband, G. H., by whom she had children, brothers and sisters of the half blood to A. M. W., but not of the blood of B. M. the ancestor of A. M. W., and who were living at his death:

Held, 1. That A. M. W. and M. C., being tenants in common, each was seized solely or severally of his individual share of the land: and all there was of unity between them was of possession, not of estate, in the land. 2. That such possession they could sever and divide, and assign to each his separate part by parol; and the releases which they executed effected nothing more. Neither acquired any new estate. 3. That upon the death of A. M. W., intestate, unmarried, without descendants, leaving no father, the fee descended to his mother, M. H., and to the exclusion of the brothers and sisters of the half blood of A. M. W., they not being of the blood of B. M., the ancestor, of A. M. W. (*Conkl.* agt. *Brown*, 57 *Barb.*, 265.)

DESERTION.

See **CONSTITUTIONAL LAW.** (52 *Barb.*)
ELECTIONS. (*Id.*)

DEVISE.

1. R., by will, after the payment of his debts, gave to his executor all his estate in trust for the following uses and purposes: to pay and apply the whole net income to the use and support of his mother and his wife (the defendant), share and share alike, during the life of his mother, permitting them to occupy his farm during her life; and upon her death to pay two specified legacies. He also directs the executor to invest a certain sum, and apply the income to the support of certain legatees. By the fifth clause, he gave "all the rest, residue and remainder of his said estate" as his beloved wife Jane Read, and to her heirs and assigns forever "which was to be accepted and received in lieu of

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dower and right of dower; and he thereby authorized and empowered his said "executor to sell and convey his real estate at any time after the death of his said mother, and to pay over the proceeds thereof to his said wife."

Held, that the power to sell, given to the executor, was legal and valid, as a power in trust, and not inconsistent with or repugnant to the residuary devise. (*Skinner* agt. *Quinn*, 43 N. Y., 99.)

2. A devise of land to trustees directing them to execute and deliver to a corporation a deed of conveyance thereof, for the uses and purposes and with the restrictions set forth in the will, creates no valid trust in such trustees, and gives them no title; but vests immediately and absolutely in such corporation the land devised. (*Adams* agt. *Perry*, 43 N. Y., 487.)

3. Where executors under a power of sale given by the will, sell real estate specifically devised by the same will, the avails become assets in their hands for the payment of debts and legacies; but the residue of such assets, after the payment of debts and legacies, belong to the devisee, and should be paid to him. (*Erwin* agt. *Loper*, 43 N. Y., 521.)

See ACCUMULATIONS. (*Id.*)
PERPETUITIES. (*Id.*)
WILLS. (*Id.*)

DISCHARGE OF LIABILITY.

See BILLS OF EXCHANGE. (2 *Lansing*.)
PROMISSORY NOTES. (*Id.*)

DIVORCE.

1. Section 135 of the Code forbids the court to allow a defendant, in an action of divorce commenced by service by publication, to come in and defend. (*Denton* agt. *Denton*, ante, 221.)

2. Where a judgment of divorce has been regularly and fairly obtained, it ought to be considered as final and conclusive unless reversed on appeal. (*Id.*)

3. But where such a judgment has been obtained by fraud, and especially where both parties to be affected by a vacatur of the judgment, have been parties to the fraud, the judgment should be set aside and the injured party permitted to defend herself against the charge of adultery, on which

the judgment of divorce was obtained. (*Id.*)

4. Where, as in this case, both the plaintiff and the woman he has married have conspired to impose upon the court, and have thereby obtained a judgment which would never have been ordered had the whole truth been disclosed, they cannot be permitted to enjoy the fruit of their unfair practices. (*Id.*)

5. Every court of record, unless restrained by positive enactment, has the power to vacate its judgments when it is established that they were obtained by fraud. (*Id.*)

6. If the provision of the Code sanctions such proceedings to obtain a judgment of divorce as was resorted to in this case, and binds the hands of the courts so that no relief can be afforded, the sooner such legislation is repealed the better for the peace and good order of society. (*Id.*)

7. A decree of divorce obtained in another state upon a personal service of process upon the defendant in this state, is valid and effectual, so far as the plaintiff is concerned. (*Holmes* agt. *Holmes*, 57 Barb., 305.)

8. In an action by a husband against his wife, for a decree declaring a divorce obtained by her, from her former husband, in Illinois, void for want of jurisdiction and for irregularity, the complaint admitted that both parties went to Illinois, and that both appeared in the action there:

Held, that such appearance clearly gave the court jurisdiction over the persons of both parties; and whether the court could grant a divorce depended not on jurisdiction, but upon the pleadings and evidence in the case:

Held, also, that the plaintiff could not avail himself of such causes to have a marriage between him and the defendant declared void, when he, at the time, had knowledge of the divorce, and that the defendant had gone to Illinois to procure one. (*Kinnier* agt. *Kinnier*, 58 Barb., 244.)

9. Even if the court could, within a proper time, declare a judgment, for divorce, rendered in the state of Illinois, void, no such action should be taken after the judgment has become absolute, and the time for appealing has expired, so that it cannot be reversed in that state. The judgment is then final, and the rights of the parties, under it, are perfect; and this court should not interfere with it. (*Id.*)

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DOWER.

1. A suit brought by a widow to set aside an instrument by which she elected to accept certain provisions of the will in lieu of dower, is not a proceeding for the recovery of dower, within the meaning of the Revised Statutes, compelling her to take such proceeding within a year. (*Chamberlain* agt. *Chamberlain*, 43 N. Y., 424.)
2. Under a condition requiring the devisee and legatee (the widow as well as others) to renounce all claim to any share or interest in the estate other than as given by the will, without exception, the court cannot except from the operation and effect of the condition, any part of the estate, although its attempted disposition by other clauses in the will is held invalid. (*Id.*)

DRAFTS.

See **BILLS OF EXCHANGE.** (43 N. Y.)

DURESS.

See **BONA-FIDE HOLDER.** (43 N. Y.)
BURDEN OF PROOF. (*Id.*)

E.

EASEMENT.

1. The grant of a right to conduct water by means of pipe laid beneath the surface of land, from a spring thereon, is a grant of an easement, and not of any part of the land itself. (*McMullin* agt. *Wooley*, 2 Lansing, 394.)
2. The existence and uses of such an easement, by the grantee thereof, constitutes no breach of a covenant for quiet enjoyment, or of warranty in a subsequent deed by his grantor. (*Id.*)
3. It seems that to protect himself against an easement upon land, the purchaser must take a covenant against incumbrances (*Id.*)

EJECTMENT.

1. *Semble*, that, in an action of ejectment, proof that a party other than the defendant, and from whom he does not claim, holds merely a sheriff's certificate of sale of the land in question, is no defense (*Cruger* agt. *Dougherty*, 43 N. Y., 107.)

See **TENANCY AT WILL AND BY SUFFERANCE.** (*Id.*)

2. Upon recovery in an action for possession of land, interest on the value of each annual rent, which might have been obtained for the land, is allowable by way of damages. (*Low* agt. *Purdy*, 2 Lansing, 422.)

ELECTION OF ACTIONS.

1. Judgment against E as maker, G as first and T as second indorser of a promissory note, was enforced by execution sale of G's land, at which T was the purchaser for the amount due upon the judgment, he having become the assignee thereof, and expenses. T agreed to give three years to redeem, and persuading M that nothing had been realized toward satisfying the judgment, agreed with him to satisfy it on receiving certain payments, in the aggregate considerably less than the amount due thereon, and also assigned his certificate of sale, to G on payment to the latter of a sum in full of, and nearly equal to the amount of his bid. T satisfied the judgment as against all of the defendants therein, on payment by M as agreed; and when G learned of the transaction he sued T, and recovered judgment for the amount paid on assignment of the certificate: but T being deceased, his estate paid but part of the judgment.

Held, that G had an election upon discovery of the satisfaction given to M either to ratify it and claim to recover from T the amount which he had paid to the latter, or to ratify the execution sale and recover from M, as principal debtor, upon the theory that he (G) had paid the judgment; but that having elected to pursue the former remedy, he could not recover afterward from M the balance of his judgment against T. (*Goss* agt. *Mather*, 2 Lansing, 283.)

2. After six months are elapsed from the delivery of possession of demised premises under an execution upon a judgment in ejectment in favor of the landlord, the tenant's right of redemption under the statute (3 R. S. 506, §33) cannot be revived by the issuing of a new writ upon the judgment made necessary by his unlawfully re-entering upon the premises. (*Van Rensselaer* agt. *Whitbeck*, 2 Lansing, 498.)
3. And it seems that the tenant cannot enlarge the time allowed him for redemption under the statute, by

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wrongfully retaking possession before the original execution run out, and thus rendering the execution incomplete (*Id.*)

4. The provisions of the article of the Revised Statutes entitled, "Of the recovery of possession of demised premises for non-payment of rent, by ejectment," are applicable to the so-called manor leases. (*Id.*)

5. Nor is the relief upon judgment in ejectment upon such leases, limited at common law to a right to hold possession of the land for time sufficient to satisfy the rent in arrear, costs, &c. (*Id.*)

See DEED. (*Id.*)

VENDOR AND PURCHASER OF CHATTEL. (*Id.*)

ELECTIONS.

1. Inspectors of election have no right to exclude the vote of an individual, on the ground that the person offering it is a deserter from the army; where there is no evidence produced before them of the conviction of such person as a deserter, and his consequent forfeiture of the rights of citizenship. (*Gotcheus agt. Matheson*, 58 Barb., 152.)

EMINENT DOMAIN.

1. Upon the application of a railroad company to appropriate lands by the exercise of the right of eminent domain, delegated to it under the general railroad acts, it is for the court to decide as to the necessity and extent of such appropriation, and the determination of the board of directors of such company is not conclusive upon that question. (*Renss. & Sar Co. agt Davis*, 43 N. Y., 137.)
2. The acquisition of lands for speculation or sale, or to prevent interference by competing lines or methods of transportation, or in aid of collateral enterprises, remotely connected with running or opening of the road, although they may increase its revenue and business, are not such purposes as authorize the condemnation of private property therefor. (*Id.*)
3. Accordingly, where a railroad company, having one of the termini of its road upon a navigable water-way extending into the territory of a foreign power, in its application for the acquisition of certain lands, situate on the shore of such water-way near the said terminus, alleges as a prominent

reason, for their condemnation, that a charter had been granted by such foreign government for the construction of a ship canal connecting the said water-way with other navigable waters, which, when completed, would greatly increase the business of the railroad, and that the lands were needed for the construction of slips and docks for the accommodation of vessels bringing freight to, or taking it from the said road, and of tenements for the employes of the railroad, and to meet the requirements of the anticipated increased business; and it appeared from the proofs that the company already had, at such terminus, a convenient and accessible water front and docks, which were used but in part, and were capable of extension on its own premises, and it did not appear that the work on the ship canal referred to had been commenced, or that the capital to construct it had been secured. *Held*, that it was not sufficiently shown that the lands were required for the present or prospective business of the corporation within the meaning of the statute, and they could not be taken against the will of the owner. (*Id.*)

4. The taking of private property for public uses is in derogation of private right, and in hostility to the ordinary control of the citizen over his estate, and statutes authorizing its condemnation are not to be extended by inference or implication. (*Id.*)
5. Depreciation in the value of property, resulting from alterations and changes made in the neighborhood, for a public purpose, under an act of the legislature, in general furnishes no ground of action to the owner of the damaged property while it remains intact. (*Costar agt. Mayor of Albany*, 43 N. Y., 399.)
6. Accordingly, where, in pursuance of an act of the legislature, a public bridge, connecting a pier with the adjoining land, was removed, by reason of which it was made necessary, in order to reach the store of the plaintiffs, to go over another bridge, at a much greater distance. *Held*, that the damages resulting to the plaintiff's property were too remote, and could not be recovered in an action brought against a municipal corporation, who by bond had assumed the liability of the State. (*Id.*)

EQUITABLE OWNERSHIP.

See DEFENSES. (2 Lansing.)

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EQUITABLE SET OFF.

1. Equity requires that cross demands be set off against each other, if, from the nature of the claim or the situation of the parties, justice cannot otherwise be done. (*Smith agt. Felton*, 43 N. Y., 419.)
2. The insolvency of one of the parties is a sufficient ground for the allowance of a set-off in equity. (*Id.*)
3. Accordingly, *held*, that the amount of a partnership deposit with an insolvent banker was a proper subject of set-off in an action brought by the assignee in trust for creditors of such banker, on a note held by the banker made by one of the partners and endorsed by the other for partnership purposes, although such note was not due at the time of the assignment. (*Id.*)

EQUITY.

Where a court of equity acquires jurisdiction for the purpose of compelling specific performance of a contract in reference to land, if it appear that an accounting between the parties of the rents and profits is proper it will proceed to order such accounting and to direct the payment by any one of the parties of the amount of such rents and profits found due from him. (*Taylor agt. Taylor*, 43 N. Y., 578.)

2. It is a universal rule with a court of equity never to permit injustice to be done, or a wrong to go unredressed upon mere technical objections, if the court has jurisdiction of the subject matter and of the parties; especially if such injustice lies in the way of the enforcement by the court of its own judgment. (*De Bemer agt. Drew*, 57 Barb., 448.)
3. When a court of equity obtains jurisdiction of an action for any purpose for which it is authorized to give judgment, it holds such jurisdiction for every other purpose; especially for the purpose of giving effect to its judgment. (*Id.*)
4. Courts do not relieve from acts done under a false impression as to the facts, though under a mistake of the law. The parties must be left to other remedies founded on fraud, if it existed; or, if relief can be granted in any case for mistake of the law, founded on the fact that the adverse party had parted with nothing of any real value. (*Garner agt. Bird*, 57 Barb., 277.)

See INJUNCTION. (*Id.*)

JURISDICTION. (*Id.*)
 PRINCIPAL AND AGENT. (*Id.*)
 REFORMING INSTRUMENTS. (*Id.*)
 SPECIFIC PERFORMANCE. (*Id.*)
 SPECIFIC PERFORMANCE. '58 Barb.)
 TRUSTS AND TRUSTEES. (*Id.*)

ERROR.

When evidence has been improperly rejected and the judgment is sought to be sustained on the ground that the facts established by the verdict show that the evidence, if admitted, would not have changed the result, it must appear that such is *necessarily* the effect of the verdict: not that the jury *might*, but that they *must* have found as claimed. (*Starbird agt. Barrons*, 43 N. Y., 200)

See APPEAL. (*Id.*)

ARREST OF JUDGMENT. (*Id.*)
 FINDINGS OF FACT AND CONCLUSIONS OF LAW. (*Id.*)
 PLEADINGS. (*Id.*)
 WITNESS. (*Id.*)

ESTATE FOR LIFE.

See DEVISE AND BEQUEST. (2 *Lansing*.)
 EXECUTORS AND ADMINISTRATORS. (*Id.*)

ESTOPPEL.

1. The fact, that taxes levied upon assessments made in a defective and illegal manner in previous years, had been paid by the owners of the property, creates no estoppel upon their objecting to the validity of an assessment subsequently made in the same defective mode. (*Cruger agt. Dougherty*, 43 N. Y., 107.)
2. There can be no estoppel *in pais* in behalf of one having full knowledge of all the facts. And this principle extends to the case of the party's agent having such knowledge, when negotiating the contract out of which the estoppel is claimed to arise. (*Baker agt. Union Mut. Life Ins. Co.*, 43 N. Y., 283.)
3. An acknowledgment on a policy of life insurance of so much money received in cash, is between the immediate parties to the contract, but an admission, and liable to be contradicted. (*Id.*)
4. And where the husband procures a policy of insurance on his own life, but payable to his wife, and the con-

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tract is on its face with her as the "assured," if she adopts such policy and sues upon it, her claim must be subject to such stipulations and conditions as were made by the husband on entering into the contract with her. (*Id.*)

5. Where a party gets nothing by the contract sought to be enforced against him—neither title nor possession of property—he is not estopped from setting up his defense. (*Saxton agt. Dodge, 57 Barb., 84.*)

6. An estoppel cannot be predicated upon a *nudum pactum*. (*Id.*)

7. If the whole arrangement for the sale and purchase of a patent is *nudum pactum*, a stipulation that the purchasers shall not dispute the vendor's right and title, and will not set up any defense against the validity of the patent, in any action against them to enforce their promises, is as void as any other part, and cannot estop. (*Id.*)

8. To a suit brought for the partition of a lot, several persons who owned the rear part thereof were all made parties. In the decree in that suit the description of the property ordered to be sold did not include the rear of the lot. All the parties having any title to the lot gave releases, except F. On the sale the whole lot was sold, and F. was paid, and gave a receipt for her share of the proceeds, but executed no release. She, knowing of the sale, made no objection thereto:

Held, that her acts, in not objecting to the sale, and afterwards receiving payment for her share, *estopped* her, and her representatives, from claiming any interest in the land; and that the sale of the lot under the decree in the partition suit, was to be considered as conveying a good title to the whole lot, although it was not correctly described in such decree. (*Garnar agt. Bird, 57 Barb., 277.*)

9. Although a mistake as to the law forms no ground for reforming a contract, yet where a party acting under a mistake of law or of fact, does acts which mislead the adverse party, he is estopped, as well as if he was not acting under such mistake. (*Id.*)

See BOARD OF SUPERVISORS. (58 *Barb.*)
DEED. (2 *Lansing.*)
DEFENSES (*Id.*)
HIGHWAY. (*Id.*)
VENDOR AND PURCHASER OF CHATELS. (*Id.*)

EVIDENCE.

1. After dissolution, the letters of a former partner, not a party to the suit, are not competent evidence against the other partner, who issued alone, as admissions, or as tending to prove general facts in the case. (*Williams agt. Manning, ante, 454.*)

2. As to such facts the partner not sued is a competent witness, and must be called. (*Id.*)

3. The plaintiff having averred his insolvency as a reason for not suing him, cannot claim that he is a party in interest, and therefore, represents the solvent party. (*Id.*)

4. Where an attorney collects a debt of less than \$200 for absent clients, and so manages the business as to involve his clients in six suits, with expenses of several thousand dollars, such facts are proper to be considered in fixing the amount of compensation to be recovered of the clients by the attorney. (*Id.*)

5. The question whether the evidence justified the verdict of the jury, finding the defendant guilty of murder in the first degree, cannot be examined in this court. (*People agt. Lewis, ante, 508.*)

6. Evidence as to the acts and declarations of the defendant, after the perpetration of the crime, is not admissible in his behalf. (*Id.*)

7. Where the real issue on the trial was, whether the defendant *designed* to effect the death of the deceased, evidence offered by the defendant to prove the facts and circumstances constituting the provocation, which induced the attack by him upon the deceased, which occurred a few minutes previous to such attack, was admissible upon the question of such degree, especially where the acts of the defendant were such as not at all likely to produce death. (*Id.*)

8. In a criminal trial, evidence of the good character of a prisoner is of value not only in doubtful cases, but also when the testimony tends very strongly to establish the guilt of the accused. It will, of itself, sometimes create doubt, when, without, none would exist. (*Remsen agt. People, 43 N. Y., 6.*)

9. Accordingly, where the judge charged that good character was a fact to be considered by the jury like every other fact in the case, no matter what the other testimony in the case might be, but when the evidence is positive, leading to a conclusion logically and

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fairly derived of guilty from all the testimony, the simple fact that a person possesses previous good character will be of no avail:

Held, error. (Id.)

10. When the plaintiff is to transport a cargo to be delivered to him by the defendant, from Rochester to New York by way of the canal, and the plaintiff's boat, being frozen up in the canal on its passage, is injured by measures taken by the defendant to preserve the cargo:

Held, in the action brought by the plaintiff against the defendant for the injuries so done to his vessel, that evidence of a counter claim, existing in favor of defendant against plaintiff, for damages occasioned to the cargo, by the alleged improper delay of the plaintiff in prosecuting his voyage, was admissible, and that the rejection was error, there being conflicting evidence as to whether there had been such improper delay. (*Starbird* agt. *Barrons*, 43 N. Y., 200.)

11. Secondary evidence as to the contents of notes, given up on the substitution of new paper is competent as the presumption is that being no longer of any value they were destroyed when given up. (*Chrysler* agt. *Renois*, 43 N. Y., 299.)

12. As a rule, witnesses must state facts, and not draw conclusions or give opinions; and the exceptions to this rule are not to be extended or enlarged. (*Terpenning* agt. *Corn Exchange Ins. Co.* 43 N. Y., 279.)

13. On a question of value, a witness can only testify to an opinion, when it is shown competent to speak upon the subject. (*Id.*)

14. It is not permitted to give in evidence the opinion, even of witnesses having knowledge of the subject matter, as to the damages resulting from a particular transaction. (*Id.*)

15. Accordingly, in an action against an insurance company to recover for a store of goods, destroyed by fire, insured by such company, evidence of a witness, who testified that he was in the store quite frequently, and there the day before the fire, as to "what amount of goods were in the store at the time of the fire, according to his estimate":

Held, inadmissible. (*Id.*)

16. A sheriff's certificate of sale for non-payment of taxes is presumptive evi-

dence only of the facts therein contained, and such certificate can legally contain only the facts required by the statute. (*Overing* agt. *Foot*, 43 N. Y., 290.)

See BURDEN OF PROOF. (*Id.*)
BURGLARY. (*Id.*)
CONTRACT. (*Id.*)
GOOD CHARACTER. (*Id.*)
LIFE INSURANCE. (*Id.*)
STAMPS. (*Id.*)
TRIAL. (*Id.*)
WITNESS. (*Id.*)

17. On the trial in the county court, of an action on a contract for the sale and purchase of wood, evidence was given to show that both the defendant and his witness stated the contract differently, then, from what they had previously stated it on the trial of the cause before the justice; the difference in the two statements being quite material upon the merits of the controversy, to wit, the quantity of wood to be paid for by the defendant:

Held, that the evidence was properly admitted, it being, as to the defendant himself, in the nature of admission or declarations by a party, and principal evidence against him, upon the issue; and also competent as impeaching evidence against him, or his witness. (*McAndrews* agt. *Santee*, 57 Barb., 193.)

18. The rule excluding the testimony of the wife, as to her husband's declarations to her during the existence of the marriage relation has no application to words spoken at the very time of forming the marriage. (*Van Tuyl* agt. *Van Tuyl*, 57 Barb., 235.)

19. The declaration of the husband, made in promiscuous conversations having no reference to his relations with his wife, or to the status of her or her children, are inadmissible as evidence. (*Id.*)

20. Where the plaintiff and defendant, who are both men of fair character, and stand alike unimpeached, and are of equal credibility, being examined as witnesses, contradict each other directly upon a question of fact, and their testimony is totally irreconcilable, in the absence of other testimony, the case will stand evenly balanced, and the complaint will be dismissed. (*Loose* agt. *Morey*, 57 Barb., 561.)

21. But if the plaintiff is fully and circumstantially corroborated in his statement of the facts, by the written agreement of which a specific performance is sought duly executed in form, and perfect in all its parts, even to the cancella-

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- tion of the stamp, and by the testimony of the subscribing witness thereto; so that if the evidence of both parties should be stricken out, or disregarded, as equally balanced, the plaintiff's case would still stand well proved; this will justify a decree in favor of the plaintiff, if the facts thus proved be sufficient to warrant the relief asked for. (*Id.*)
22. Surveys, maps, and field-notes, made by a stranger, without authority or right, cannot be received to alter, contradict or vary a title under a previous deed. (*Marble* agt. *McMinn*, 57 *Barb.* 610.)
23. And a deed with its description taken from such a survey or map, ought to have authenticity, to make it evidence. (*Id.*)
24. In the absence of evidence showing his identity, or that he was even a surveyor, or the correctness of his survey, the survey and maps of such person are worse evidence, as against the parties in interest, than even mere hearsay. (*Id.*)
- See CRIMINAL LAW. (*Id.*)
 EXECUTION. (*Id.*)
 JUDGMENT. (*Id.*)
 RAILROAD COMPANIES. (*Id.*)
25. The books of a bank, not kept by either of the parties to an action, nor relating to transactions between them, but referring solely to transactions between the defendant and the bank, are not competent evidence, between the parties, to show the amount of paper which has been discounted by the bank for the defendant, and the number of notes so discounted and renewed. And a statement made up from such books is equally incompetent. (*Perrine* agt. *Hotchkiss*, 58 *Barb.*, 77.)
26. Whether letters, written by one person to another, containing statements of the amount of funds therewith, or previously, sent by the writer, to the person addressed, which letters were received by the latter, and retained without objection or reply, are competent or sufficient evidence to show an implied admission by the recipient of the letters, of the truth of the statements therein? *Quære.* (*Resseguie* agt. *Mason*, 58 *Barb.*, 86.)
27. Account books of the plaintiff's intestate, so far as they give credits to the defendant, are admissible, because the entries are against the interest of the plaintiff; they are therefore competent evidence. (*Terry* agt. *McNiel*, 58 *Barb.*, 211.)
28. Prices current, published for public information, and for general purposes, in a public newspaper, are admissible in evidence for the purpose of showing what was the price of grain, in the market, at the time of publication. (*Id.*)
29. In an action by the administrators of the assignee of a bond and mortgage, against the mortgagor, to recover the balance due thereon, a mortgage book, owned by such assignee, containing entries of payments, and of interest accrued, upon the bond and mortgage in question—after proof that such book, and the entries therein, had been shown to and examined by the defendant, who, made no objection thereto, claiming only that there was one receipt not credited therein—is admissible in evidence, not technically as a book, but as containing a statement of debt and credit between the parties, admitted to be correct, to a certain extent, by the defendant. (*Id.*)
30. Where improper testimony is admitted which may have influenced the mind of the judge, before whom an action is tried, the judgment cannot stand. (*Bennett* agt. *McGuire*, 57 *Barb.* 625.)
31. In an action against a judgment debtor and his assignee, to set aside assignments of securities made by him in fraud of creditors, the testimony of the debtor, taken upon his examination in proceedings supplementary to execution on the plaintiff's judgment, is inadmissible as against the assignee and the wife of the debtor, who has taken a subsequent assignment of the securities, from such assignee. (*Id.*)
- See INSURANCE, (LIFE.) (*Id.*)
 NEGLIGENCE. (*Id.*)
 PRINCIPAL AND AGENT. (*Id.*)
 PROMISSORY NOTES. (*Id.*)
 STOCK (*Id.*)
 WATER. (*Id.*)
30. The measure of damages being the difference between the actual value and value if as represented of the cheese, on a sale thereof under false and fraudulent representations as to its quality, and the sale having been made with reference to the market at New York, and the value at that place in fact, and the value which it would have had there, if as represented, being shown evidence of the amount actually realized by sale of the cheese in England, was held inadmissible to reduce the defendant's damages. (*Durst* agt. *Burton*, 2 *Lansing*, 137.)

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31. Nor were the defendants entitled to show that the market price for cheese at New York was controlled by the market at London, in connection with proof that through sales in London in the ordinary course of business, the plaintiff netted a larger sum for the cheese than the actual market value thereof at New York, and especially where the evidence did not relate to the time in question. (*Id.*)
32. The plaintiff in an action to recover for his services under an agreement to remunerate and board him in consideration thereof, may show the value of his services with or over and above board, by the testimony of a witness who has had no knowledge of the value of the board furnished. (*Stevens* agt. *Benton*, 2 *Lansing*, 156.)
33. He may not show the compensation paid him for like services by a former employer in whose service he had been directly before the services in question, and who had taken him into employment after a prior engagement with the defendant. (*Id.*)
34. In an action brought to set aside the deed of a deceased grantor, as fraudulent against his creditors, with a view to a subsequent application to the surrogate for sale thereof under section 22, chap. 460, Laws of 1857, which, as amended in 1843 (chap. 472), renders a judgment upon the merits against administrators, &c., *prima facie* evidence of indebtedness upon the application.
- Held*, that the plaintiff did not sustain his complaint by simply showing a judgment in his favor against the grantor's administrator. (*Sharp* agt. *Freeman*, 2 *Lansing*, 171.)
35. Where a promissory note is found in the maker's hands cancelled, his indebtedness thereon is presumptively discharged, and proof that no payment has been made, nor offset surrendered in respect thereof, does not destroy the presumption. (*Gray* agt. *Gray*, 2 *Lansing*, 171.)
36. A prisoner sworn as a witness upon his own trial, under chap. 678 of the Laws of 1869, waives the constitutional protection (art. 1, § 6), by which no one may be compelled, in any criminal case, to be a witness against himself, and may be examined upon any matter pertinent to the issue. (*McGarry* agt. *The People*, 2 *Lansing*, 227.)
37. Chapter 3 of the laws of 1848, providing for the punishment of seduction under promise of marriage, enacts that "no conviction shall be had under the provisions of this act on the testimony of the female seduced, unsupported by other evidence." Where on the trial of an indictment under this act the prosecutrix testifies to the promise, intercourse, and other facts essential to constitute the offense, and other testimony tending to support her upon such points is given, whether or not she is sufficiently supported to justify a conviction is a question for the jury. (*Crandall* agt. *The People*, 2 *Lansing*, 309.)
38. The plaintiff suspended a scaffold in front of a house upon which he was employed as a painter, by fastening one of the ropes attached thereto to the chimney of the defendant's adjoining house, without the latter's permission; as he stepped upon it, on returning to his work, the rope untied from the chimney, and he received injuries by the fall of the scaffold, for which he sued the defendant. Upon the trial it appeared that the defendant having been informed that the rope was fastened to, and that it endangered his chimney, was afterward, on the day preceding the accident, seen upon his roof handling the rope; that afterward when charged with causing the accident he did not deny it, but offered to pay for medical attendance to the plaintiff if not excessive in amount. At the close of the plaintiff's testimony the court refused a non-suit; but after the defendant had given evidence contradicting that of the plaintiff, and tending to show that it was manifestly untrue, and had himself sworn that he did not touch the rope, or know what was suspended to it, on renewal of a motion therefor, it was granted.
- Held*, that the evidence should have gone to the jury and a nonsuit was wrong. (*Phillips* agt. *Willers*, 2 *Lansing*, 389.)
39. *Held* further, that the defendant was justified by the plaintiff's trespass in not recklessly unloosening the rope; and that it was for the jury to say whether he did unloosen it, and if so, whether he exercised proper care in ascertaining what was fastened to it. (*Id.*)
40. To maintain his action as administrator, the plaintiff proved letters of administration in which his intestate's decease, and residence immediately prior thereto in the county of the surrogate from whom the letters issued were recited.
- Held*, that there was *prima facie* evidence of the facts so recited. (*Belden* agt. *Meeker*, 2 *Lansing*, 470.)
41. Proof that the intestate did business,

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and had an office in the county, is, it seems, presumptive evidence that he resided there at the time of his decease. (*Id.*)

See ASSIGNMENT OF MORTGAGE. (*Id.*)

APPEAL. (*Id.*)

ARSON. (*Id.*)

DEFENSES. (*Id.*)

EXECUTORS AND ADMINISTRATORS. (*Id.*)

JURY AND JURY TRIAL. (*Id.*)

MONEY HAD AND RECEIVED. (*Id.*)

PLEADING. (*Id.*)

POLICY OF INSURANCE. (*Id.*)

SURROGATE AND SURROGATE'S ORDER. (*Id.*)

WITNESS. (*Id.*)

EXCEPTIONS.

1. It rests exclusively in the discretion of the judge holding the circuit, whether exceptions taken in a cause tried before him shall be heard in the first instance at the general term, or at the special term. (*Beattie* agt. *Niagara Savings Bank*, ante, 137.)
2. It is quite certain that no appeal would lie from such an order; and it seems that its reversal cannot be accomplished by a motion at special term to vacate it. (*Id.*)
3. Where the exceptions taken on the trial were, at the close of the trial, ordered by the judge to be heard in the first instance at the general term, and the exceptions were argued before the general term, but that court finding itself unable to grant the defendant relief, and that it could only be done by the special term, omitted to decide the case and held it under advisement; and in the mean time a motion was made by the defendant at special term for an order vacating the order of the circuit judge directing the exceptions to be heard at the first instance at general term, which was granted:

Held, on appeal from this last order, that it be vacated, without costs, as the question was a new one. (*Id.*)

4. The practice of sending these cases to the general term, unnecessarily increases the business of that court, and such an order should not be made unless in cases of the highest importance, or of absolute necessity. (*Id.*)
5. An exception to a request to charge which is erroneous in part as embracing too much, is entirely ineffectual. (*Hodges* agt. *Cooper*, 43 *N. Y.*, 216.)

See APPEAL. (*Id.*)

ARREST OF JUDGMENT. (*Id.*)

CRIMINAL LAW. (*Id.*)

ERROR. (*Id.*)

TRIAL. (*Id.*)

PRACTICE. (57 *Barb.*)

PRACTICE. (58 *Barb.*)

PRACTICE. (2 *Lansing.*)

EXCISE.

1. County commissioners of excise holding office under the law of April 16th, 1857, sued to recover penalties as therein provided: after suit the "act regulating the sale of intoxicating liquors" of April 11th, 1870, was passed, and the defendant pleaded it as a defense. On demurrer to the answer it was held that the plaintiffs were authorized to prosecute the action notwithstanding the latter law. (*Board of Commissioners of Excise* agt. *Willey*, 2 *Lansing*, 427.)
2. The act of 1870 did not altogether abolish the county board of commissioners of excise then existing. Per *MARVIN, J.* (*Id.*)
3. It deprived them of the power to grant licenses, but not to sue for the penalties inconsistent with such act, which are provided for by the act of 1857. (*Id.*)
4. Various provisions of the acts of 1857 and 1870, compared and commented on. (*Id.*)

EXECUTION.

1. In an action to recover the value of a horse, wagon, sleigh and harness sold by the defendant on execution, which property was claimed to be exempt, the plaintiff proved that he was a householder, having a family for which he provided; that he owned no other horse, wagon, sleigh or harness; and that he used the property for cultivating land, carrying goods to market, &c. *Held*, that within the rule established in *Wilcox* agt. *Hawley*, 31 *N. Y. Rep.* 658, the plaintiff had established the facts that he was a householder, and had a family for which he provided, and that he used the property in question as a team, for the support of his family: and that the evidence was sufficient to authorize a judgment in favor of the plaintiff. (*Smith* agt. *Slade*, 57 *Barb.*, 637.)
2. And the value of the property being within the limit allowed by law, to wit, \$250; *held*, that the same was exempt from sale on execution issued upon a judgment recovered on a note

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given by the plaintiff and another person, jointly for the price of a horse purchased by the latter for himself; it not appearing that such horse was purchased for, or used as a team, or a part of a team, by any one. (*Id.*)

3. Although the burden of proof is with a party claiming the property levied on was exempt from execution, to show affirmatively that it was necessary for the support of his family, yet it is not required that he should employ the word *necessary*, in his evidence. It is sufficient that he shows facts that prove, or tend to prove, such necessity. (*Id.*)
4. It is not necessary for the plaintiff to show that he had not other articles exempted by statute, of the value of \$250, or which, with the articles mentioned in the complaint, exceeded the sum of \$250. (*Id.*)
5. It is sufficient for the plaintiff, on the trial, to show that the articles levied on, and claimed to be exempt, are enumerated in the statute as exempt property when the same are *necessary*; and then to show them to be necessary, and within the limit as to value. Neither the statute nor the rule of legal evidence calls upon the plaintiff to prove what else he may own. (*Id.*)
6. The exemption in the statute was not made to depend on the pecuniary ability of the debtor. (*Id.*)

See JUDGMENTS AND EXECUTIONS. (2 Lansing.)

EXECUTORY BEQUEST.

1. An executory bequest limited to the use of the corporation to be created by the legislature within the period allowed for the vesting of future estates and interests is valid. (*Burrill agt. Boardman, 43 N. Y., 254.*)
2. Such a bequest neither contravenes the statute of perpetuities nor is it void on account of the uncertainty of a beneficiary. (*Id.*)

EXECUTORS AND ADMINISTRATORS.

1. The six months' notice to creditors, given by executors, under the Revised Statutes, (2 R. S., 89, § 39.) when duly published, exempts such executors from all liability to the creditor of their testator, whose claims are not presented, for any assets paid over in good faith

by them, in satisfaction of claims of an inferior degree, or of legacies, or in making distribution to the next of kin. (*Erwin agt. Loper, Ex'or. &c., 43 N. Y., 521.*)

2. Where executors, under power of sale, given by the will, sell real estate, the avails become assets in their hands for the payment of debts and legacies, and to be accounted for the same as other assets. (*Id.*)
3. But the residue of such assets, after the payment of such legacies and debts as are presented, belongs to the devisees to whom the lands have been devised, subject to the executor's power of sale. (*Id.*)
4. Accordingly, an executor, who, after the requisite publication of notice to creditors, and the payment of all claims presented thereunder, pays over to the devisee the remainder of the avails of lands sold by him under a power of sale in the will, is not liable to other creditors of the testator for such avails. (*Id.*)

See POWERS IN TRUST. (Id.)

5. To render the executors of a deceased partner liable as partners, with the surviving partner, in respect to the business carried on after the death of their testator, it is necessary to show that they voluntarily employed the testator's assets which had come to them, in the trade. (*Richter agt. Poppenhusen, 57 Barb., 309.*)
6. It is not sufficient that the business is carried on by the surviving partner with their assent and encouragement; it being his right and duty to do so without either. (*Id.*)
7. Nor do executors incur any responsibility by allowing the share of the capital of their testator to remain in, and be employed in, the business of the partnership, after his death, for the benefit of the *cestuis que trust*, when it is done in accordance with the testator's instructions, contained in his will, or with the partnership agreement; but the assets so directed to be employed are liable to make good the debts contracted during their employment. (*Id.*)
8. To this extent the estate of a deceased partner will, in equity, be applicable to the liquidation of the demands of those who have become creditors of the partnership after his decease. But the executors cannot be made liable personally without entering into the partnership. (*Id.*)

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See APPEAL. (*Id.*)
WILL. (*Id.*)

9. The statute does not limit the claims to be presented to executors by creditors, to such as are due. Whether due or not, if there is an intention to make a claim against the estate, notice of that claim should be presented, and if it be not due, the statute (2 R. S. 96 § 74.) points out the course to be pursued, upon the accounting. (*Hoyt* agt. *Bonnett*, 58 Barb., 529.)

10. Executors may select a place as their place of business or residence, so far as their relation to the estate is concerned; and the designation, in a notice published in the newspapers, of a place where claims of creditors against the estate, shall be presented, makes that the residence or place of business of the executors, for that purpose, within the meaning and object of the statute. (2 R. S. 88, § 34.) (*Id.*)

11. The decision to the contrary, in *Murray* agt. *Smith*, (9 Baso. 689,) disapproved. (*Id.*)

12. Where executors, on the presentation of a claim against the estate, to them positively declined in writing, to pay the same; *Held*, that this amounted to a rejection of the claim; although they, at the same time asked for a bill of particulars, and a list of vouchers. (*Id.*)

13. *Held*, also, that the executors did not, by stating that they would be "greatly obliged" for a bill of particulars, &c., qualify their refusal to pay; they making no promise, and giving no intimation that their action would be altered by such a bill, if one were sent. (*Id.*)

14. And that if the claimants neglected to furnish any bill of particulars, they could not claim that the demand for one was a qualification of the previous rejection. (*Id.*)

15. Executors directed by the testator to invest in United States government stocks, State, city or county securities, or upon bonds and mortgages, whatever funds they might from time to time have in hand, awaiting the period for disbursement according to the provisions of the will, invested small sums, but retained in hand large average balances for several years, holding them on deposit to their individual credit, and in their names as executors, and in their different banks, shifting the deposits from one bank to another, and in part, using the same for accom-

modation of one or more of their number.

Held, that they were chargeable with interest on the balances, after allowance of reasonable time for investment, and were not excused from its payment because of objection by some of the distributees to investments in United States securities, or of difficulty in obtaining investment in bond and mortgage, or of any right to keep the money in readiness to pay over to the parties entitled, pending proceedings for distribution, and notwithstanding the legatees, &c., had not informed the executors of any opportunity to invest in proper securities. And they were charged interest at six per cent. on the sums held by them at the end of every half year, after allowing thirty days for investment. (*Gilman* agt. *Gilman*, 2 Lansing, 1.)

6. It not appearing that the executors had derived any personal benefit from the funds of the estate other than that which might have arisen incidentally to their credit from money deposited in bank, and they having credited the estate with interest on all moneys used by them.

Held, that they were not chargeable with compound interest. (*Id.*)

17. Evidence being given that testator had agreed with M, one of his executors, to support him if he would attend to his (testator's) business, and of testator's saying he had promised M to pay him sufficient for his own and family expenses, and of his expressing himself a short time before death, as satisfied with M's attention to the business.

Held, that M's claim for compensation was properly allowed as a payment to him by the executors. (*Id.*)

18. But the executors were not entitled to charge the estate with the expenses of their unsuccessful resistance to an application for an order requiring them to account, nor of their defense in proceedings for contempt for neglecting to account. (*Id.*)

19. A note of one of the executors given testator in his lifetime, having been charged to him in their account.

Held, that the charge was proper, notwithstanding judgment had been recovered on the note in Maine.

20. An executor who has paid the principal of a trust fund to a legatee entitled to an annual payment of its income only, though not allowed on his

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accounting to credit himself with the payment as a payment of principals cannot, it seems, be required to pay over again interest upon such principal. (*Saltus* agt. *Saltus*, 2 *Lansing*, 9.)

21. But on appeal from a surrogate's order, directing the investment, with interest of money so paid, if the petition of appeal specify as the sole ground of appeal, error in a certain other recited portion of the order, the error will be disregarded, and the order if otherwise proper affirmed (*Id.*)

22. Costs are not taxable against executors or administrators, as of course where judgment is recovered against them as defendants in an action. (*Howe* agt. *Lloyd*, 2 *Lansing*, 335.)

23. It seems they are only granted in such case, pursuant to section 41 (2 R. S., 90), by order upon motion. (*Id.*)

24. The plaintiff, on a referee's report in his favor, in an action against the defendant as executrix, entered judgment for damages and costs; the defendant appealed from the entire judgment and then the plaintiff readjusted the costs upon notice, and the defendant moved at special term, and obtained an order setting aside the judgment as irregular; on appeal from the order, the court directed the costs to be stricken from the judgment, without prejudice to a motion by the plaintiff for costs, and the judgment was otherwise allowed to stand without costs. (*Id.*)

25. The entry of judgment for costs in such a case is not an irregularity waivable by appeal. (*Id.*)

26. And it seems the appeal being prior to the adjustment could have no effect as a waiver upon the proceedings therefor. Nor would the court consider upon the appeal from the order, the plaintiff's right to have costs under the statute. (*Id.*)

See DEVISE AND BEQUEST. (*Id.*)

EVIDENCE. (*Id.*)

SURROGATE AND SURROGATE'S ORDER. (*Id.*)

EXEMPTION

See EXECUTION, (57 *Barb.*)

EXEMPTION OF SOLDIERS' PAY AND BOUNTY.

1. The exemption of a soldier's pay and bounty from levy or sale under an execution (*Laws* 1861, chap. 578, page

1332) does not extend to property purchased with or otherwise voluntarily obtained in exchange for the same. (*Wygant* agt. *Smith*, 2 *Lansing*, 185.)

2. The principle and extent of such exemptions explained. Per *JOHNSON, J.* (*Id.*)

EXPERTS.

See EVIDENCE. (43 *N. Y.*)

WITNESS. (2 *Lansing*.)

EXPRESS COMPANIES.

1. In an action against an express company to recover the amount of a draft received by them from the plaintiffs for collection, and as alleged, the defendants neglected to collect, or to give the plaintiffs due notice of its non-payment.

Held, that before the plaintiffs can recover more than nominal damages, they must show that they could in all probability have collected the amount of the draft, or some part of it, from the drawee, if they had received the notice of non-payment which the defendant's duty in the premises required them to give. (*Lienau* agt. *Dinsmore*, ante, 97.)

2. The defendants having used due diligence in endeavoring to obtain payment of the draft and having failed, the plaintiffs must show that they could have done better, and that there was, at least, a reasonable probability that they could have collected the amount if they had been properly notified that the same was not paid, before they are entitled to recover the full amount thereof. (*Id.*)

See CARRIERS. (43 *N. Y.*)

3. The plaintiff acting under a power of attorney from W., received from the United States government, money due from the latter to W., and thus became the debtor to W. for the amount. W. directed the plaintiff to send the money, when collected, less charges, to W. care of M., at Terre Haute. No particular method of conveyance being designated, the plaintiff delivered a package containing the amount, in treasury notes, directed to W. care of M., at Terre Haute, to the U.S. Express Company, to be transported. Such package was carried, by that company, to the termination of its route, and there delivered to the defendant to be carried to Terre Haute. It was so carried, but after diligent search, neither M. the consignee, nor

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W. could be found, and the package was retained by the defendant:

Held, that as W. had no claim to any particular money, the plaintiff, when he delivered the treasury notes to the U. S. Express Company, simply delivered his own property to be forwarded, to discharge his indebtedness to W. And that both the plaintiff and W. had such a title to the property that an action might be maintained by either of them; and a recovery by either would bar an action by the other. (*Thompson agt. Fargo*, 58 Barb., 575.)

F.

FALSE PRETENCES.

See INDICTMENT. (2 Lansing.)

FALSE REPRESENTATIONS.

See DECEIT. (158 Barb.)

PRINCIPAL AND AGENT. (*Id.*)

VENDOR AND PURCHASER. (*Id.*)

FARMING ON SHARES.

See CROPS. (2 Lansing.)

FEDERAL CONSTITUTION.

See ADMIRALTY JURISDICTION. (43 N. Y.)

CONSTITUTIONAL LAW. (*Id.*)

FELONY.

See CRIMINAL LAW. (43 N. Y.)

FIELD NOTES.

See EVIDENCE. (57 Barb.)

FINDINGS OF LAW AND FACT

1. Omissions and defects in a finding may be supplied by inferences in the appellate court in support of a judgment, but not the entire want of a finding, especially in the absence of evidence of the necessary facts in the case. (*Walsh agt. Powers*, 43 N. Y., 23.)

2. This court is concluded by the findings of fact, in the court below, unless such findings are unsupported by any evidence, or unless by undisputed evidence the contrary is established. (*Austin agt. Steamboat Co.* 43 N. Y., 75.)

3. A fact found by the court below upon conflicting evidence is not reviewable here. (*Brown agt. Vredenberg*, 43 N. Y., 195.)

See PRACTICE. (2 Lansing.)

FIRE INSURANCE.

1. In an action against an insurance company to recover for a store of goods, destroyed by fire, insured by such company, evidence of a witness, who testified that he was in the store quite frequently, and there the day before the fire, as to "what amount of goods were in the store at the time of the fire according to his estimate":

Held, inadmissible. (*Terpinning agt. Corn Exchange Co.* 43 N. Y., 279.)

2. Where a policy of insurance was issued to the owner of the mortgaged premises, in which "the loss, if any, is payable to the mortgagee," which also contained a clause, that in case of any change of title in the property insured, the policy should be void (from which latter clause, however, the interest of the mortgagee is excepted,) and also a provision that in case of payment to the mortgagee for a loss, for which the insurer would not have been liable to the mortgagor, the insurer should be subrogated and entitled to an assignment of the mortgage:

Held, the mortgaged premises having been sold prior to their injury by fire, that the amount of insurance money paid to the mortgagee by the insurers was not to be deemed a payment on the mortgage, and that the mortgage having been assigned to the insurers on payment to the mortgagee, was a valid security in their hands. (*Springfield F. & M. Insurance Co. agt. Allen et al.* 43 N. Y., 389.)

3. Where the policy, by its terms, is to become void upon "any change of title in the property insured," the policy insuring a party on "his stories," describing them, is forfeited by a transfer of the premises, although no change in or assignment of the interest of the insured had taken place subsequent to the date of the policy. (*Id.*)

FORCIBLE ENTRY AND DETAINER.

1. The statute of forcible entry and detainer was originally strictly for a criminal proceeding; and though it has been subsequently enlarged so as to embrace to a certain extent a civil

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remedy, the form of proceeding and the rules of law which govern it remain to a great degree unchanged. (*Wood agt. Phillips*, 43 N. Y. 152.)

2. A complaint under the statute relative to "forcible entries and detainers," which alleges that the complainant "had a good and legal right and estate to said premises, and that he still has a legal right to the possession of said premises," does not state the right, but the legal conclusion; and is therefore not a compliance with the statute; which requires that the complaint shall show that the complainant has some estate in the premises, then subsisting, or some other right to the possession thereof, stating the same. (*The People ex rel. Cooper agt. Field*, 58 Barb., 270.)
3. That being a statute proceeding, and the authority to proceed derived from the statute, a strict compliance therewith is required; though this objection may be waived by omitting to make it in proper time. (*Id.*)
4. H. being the owner of a lot, gave permission to F. to remove on to it a building owned by F. There was no agreement as to the time it should remain there, or for the payment of rent. Subsequently, H. conveyed the premises to third persons, who made an executory contract with the defendant and C. F. for the sale and conveyance of the premises to them, with the right of immediate possession; and they took possession. C. F. afterwards released his interest to the defendant. The latter wishing to build upon the lot, requested F. to remove the said building, which F. agreed to do; and he consented that the defendant might excavate the earth up to the building; and the defendant did excavate up to the side, and in front of, the building, without objection. Afterwards, F. sold such building to the relator, by a written contract stating that the building should remain where it was, and F. retain the possession until the price was paid, when he was to give possession to the relator. F. remained in possession, under the relator, for some time, when he removed most of his things, and gave the key to the relator. The defendant subsequently removed the building from the premises, into the street. *Held*, A. That the relator's possession, in law, if he had any possession, was precisely the same as, and no better than, that of his vendor, F. That the possession of F. was either that of a mere licensee, or as a tenant at will. And that whatever

his interest had been before the sale to the relator, it had in part been surrendered to the defendant by F. 2. That F. knew as a fact, and was bound to know in law, that the defendant had all the rights that H. possessed when he, F. moved his building upon the premises. That F., in law, could not deny the title of H. under whom he entered into possession; neither could he deny the title of H's grantees or alienees. 4. That if F. was a tenant at will, and if the relator could take a conveyance of such a tenure, the tenancy was destroyed by setting up the title of a third person, in hostility to the title under which he held, or went into possession. 2. That if there ever had been a tenancy at will, it was such an one that it had been terminated by the request of the defendant to remove the building and end the tenancy, and by the consent of F. to do so, and a surrender of a part of the premises by him, in pursuance of such request. 6. That the entry of the landlord, after this, was a legal right to enter; that he was revested with the right of possession, and could not be a wrongdoer in entering; and, as a legitimate consequence, could not be guilty of forcibly detaining that which was his own; having committed no act of violence upon the relator, or breach of the peace with a multitude of people, and with a strong hand. (*Id.*)

FORECLOSURE.

1. Strict foreclosure are not ordinarily decreed in this state, except against judgment creditors or persons similarly situated, not made parties to a previous foreclosure and sale of the premises, who claim a right to redeem. (*Bolles agt. Duff*, 43 N. Y., 469.)
2. Strict foreclosure is generally regarded in a court of equity as a severe remedy, and where a party insists upon the forfeiture, he must show that the decree clearly gives it to him. (*Id.*)
3. In the strict foreclosure implied in the dismissal of a complaint to redeem on default of payment, absolute title does not pass, and the forfeiture is not complete, notwithstanding the entering of a decree that the party be foreclosed unless within a time named he pay the sum fixed, until a final order is granted and put upon the record, upon proof of nonpayment within the time, actually dismissing the complaint. (*Id.*)
4. W. and E., having obtained from T.,

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the owner of twenty years' term in certain real property, an assignment thereof absolute in form, but in fact as security for a loan, and the owner having subsequently made a general assignment for the benefit of creditors to R., R. commenced an action against W. and E. to have the transfer of the term to them declared a mere security for the loan, and to be allowed to redeem. W. and E. denied that the assignment to them was merely a security; but after litigation it was declared such; R. was held entitled to redeem, and it was adjudged that upon payment by him of a sum named in the decree within two months from the date thereof, W. and E. were to resign the said term to him, but on default of such payment his complaint to be and from thenceforth to stand dismissed. (*Id.*)

5. R. failed (by collusion, as was alleged) to pay within the time, and subsequently assented to the assignment of the lease and all their other rights by W. and E. to the defendant. (*Id.*)

6. The plaintiff having been thereafter appointed receiver of the original owner, T., in supplementary proceedings, brought this action against the defendant, making T., R. and W. & E. parties with him, alleging fraud and collusion between R. and the defendant, and praying that he might be allowed to redeem, and the lease be reassigned to him, and that the defendant account for the rents and profits:

Held, that the plaintiff was a competent party to bring the action and, it appearing that no final order at the expiration of the two months had been entered, upon proof of non-payment, actually dismissing the complaint in R.'s suit, that the original decree therein was no bar. (*Id.*)

See STATUTE FORECLOSURE OF A MORTGAGE. (2 *Lansing*.)
GUARDIAN AND WARD. (*Id.*)
COMMON CARRIERS. (*Id.*)

FOREIGN CORPORATIONS.

1. The existence of corporations organized under the laws of a sister state is recognized by the courts of this state, and they may take personal property under wills executed by citizens of this state, if by the laws of their creation they have authority to acquire property by bequest. (*Chamberlain* agt. *Chamberlain*, 43 N. Y., 424.)

2. The courts of this state will not administer a foreign charity; but they will direct money devoted to it to be

paid over to the proper parties, leaving it to the courts of the state, where the charity is to be established, to provide for its due administration. (*Id.*)

3. Where a foreign corporation had never filed in the office of Secretary of State any designation of a person upon whom papers could be served, and there was evidence of its insolvency or refusal to pay its judgment debts; and it had discontinued its organization and the exercise of its franchises; had neglected to hold meetings of its officers; had sold out to another company its property, and its officers had become officers in the new company, its president becoming the president of the new company, and having the avails of the sale of the property of such corporation in his possession; *Held*, that these facts alone, would justify the appointment of a receiver, even *ex parte*. (*DeBeemer* agt. *Drew*, 57 Barb., 438.)

4. Where a foreign corporation, sued in this court, appears by attorney, a notice of the appointment of a receiver of such corporation, served upon the attorney, is good service. (*Id.*)

See CORPORATIONS. (*Id.*)
JURISDICTION. (*Id.*)
COMMON CARRIER. (2 *Lansing*.)

FORFEITURE.

See INSURANCE (LIFE). (58 Barb.)

FORMER JUDGMENT.

1. Where an action is brought on a contract, all claims arising under the same and then due constitute an entire and indivisible cause of action, and a judgment therein, is a bar to any further action founded on such claims. (*O'Beirne* agt. *Lloyd*, 43 N. Y., 248.)

2. A voluntary compromise or satisfaction of the claim made in an action, which embrace only part of an entire demand, does not necessarily merge the whole demand; it might sever the demand and compromise the part sued for, leaving the rest to stand. (*Id.*)

See FORECLOSURE. (*Id.*)

FORMER SUIT OR PROCEEDING.

Where it appears, from the return of a county judge to a writ of *certiorari*, that he was deceived or misled by the fraudulent pretences of the relators, upon a former motion, and that the de-

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cision thereon was obtained from him by such fraudulent pretences, such former decision will not be a bar to the second proceeding; and his final judgment may be reviewed upon the merits (*The People ex rel., Wilbur* agt *Eddy*, 57 Barb., 593.)

See JUDGMENT. (*Id.*)

FRAUD.

1. An action for fraud and deceit on the sale of a horse, by means of false and fraudulent representations, made with knowledge of their falsity and with intent to deceive, cannot be maintained without proof of a *scienter*. (*Marshall* agt. *Gray*, 51 Barb., 414.)

2. When a person, on a sale or exchange of property, warrants it, in any particular, he is accountable to the extent of the warranty, whether he knew the fact or not; but where the claim is for *fraud*, the representations must not only be false, but false to the knowledge of the party making them. (*Id.*)

3. The case of *Bennett* agt. *Judson*, (21 *N. Y. Rep.* 238.) and *Craig* agt. *Ward*, 36 Barb., 377,) have not established a different rule from the above. (*Id.*)

4. Cases may arise in which a sale, by an insolvent debtor, of all his property, upon credit, may not be fraudulent. But, as a general proposition, such a sale to a purchaser cognizant of the vendor's insolvency, is fraudulent; the necessary effect of it being to hinder and delay creditors. *Clark* agt. *Wise*, *Id.*, 416.)

See DEBTOR AND CREDITOR. (*Id.*)

HUSBAND AND WIFE. (*Id.*)

PARTNERSHIP. (*Id.*)

PRINCIPAL AND AGENT. (*Id.*)

5. M., a debtor of the plaintiff, who was insolvent, owing debts to various persons, assigned a bond and mortgage owned by him to A. without consideration, by an instrument expressing the nominal consideration of one dollar, and A., on the same day, and for the same consideration and no other, assigned such securities to M.'s wife; the assignees receiving such transfers without paying or securing, or becoming liable to pay, therefor, any consideration whatever. *Held*, that a fraudulent intent on the part of M. to prevent the plaintiff from collecting his demand, might be presumed; and that it might be fairly inferred, from the facts and circumstances, that A. and the wife of M. had full knowledge of

such fraudulent intent. (*Bennett* agt *McGuire*, 58 Barb., 625.)

6. Even if it be conceded that in some cases fraud will not be inferred from the want of consideration, alone, yet the question of fraudulent intent is a question of fact; and where there is sufficient evidence to sustain a finding of fraudulent intent, it cannot be disturbed. (*Id.*)

See LEASE. (*Id.*)

PARTIES. (*Id.*)

PROMISSORY NOTES. (*Id.*)

FRAUDULENT CONVEYANCES.

See DEBTOR AND CREDITOR. (57 Barb.)

FRAUDULENT REPRESENTATIONS.

1. Where a party made a purchase of goods on a short credit of thirty days, and within that time became insolvent, furnishing no explanation of the fact:

Held, that it was a fraudulent contracting of the debt within section 179 of the Code, and an order of arrest consequently sustained. (*Dale* agt. *Jacobs*, ante, 94.)

2. On the trial of an action to recover damages for false and fraudulent representations of soundness, on a sale of sheep which turned out to be diseased, the plaintiff excepted to a charge "that if defendant knew facts tending to prove that the sheep were unsound, and fraudulently concealed those facts, he is liable," and requested the court to omit the word "fraudulent," which request was refused, with the remark that "the word fraudulent might be omitted, and the jury might infer fraud; but there must be fraud."

Held, on appeal that there was no error. (*Clark* agt. *Bamer*, 2 Lansing, 67.)

3. The doctrine of *Binnard* agt. *Spring* (42 Barb., 470), in this respect re-affirmed. (*Id.*)

4. The plaintiff, an individual banker, having turned out worthless notes to certain of his depositors in payment of their claims, and fraudulently representing their notes to be good, sold his banking business, and took from the purchaser a bond of indemnity against all existing liabilities of the bank after the sale the depositors sued him for the fraud; the purchaser being notified, defended, and judgment was recovered in the suit for the amount originally due the depositors; the

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plaintiff paid the judgment, and brought an action on the bond to recover the amount paid.

Held, that the judgment was recovered upon a personal claim against the plaintiff, and the action was not maintainable. (*Hart agt. Messenger*, 2 *Lansing*, 446.)

5. The action for the fraud also necessarily affirmed the receipt of the note as payment and satisfaction of the depositors' claims, and payment of the judgment therein satisfied and extinguished them. (*Id.*)

6. The depositors' claims having existence against the bank at the date of the bond, if at all, by reason of the plaintiff's fraud, he could not maintain an action based upon such fraud. (*Id.*)

Held further, that the plaintiff was not entitled to be subrogated to the rights of the plaintiff in the judgment, as against the bank by payment of the judgment. (*Id.*)

See BILLS OF EXCHANGE. (*Id.*)

COMMON CARRIERS. (*Id.*)

INSOLVENT DEBTOR. (*Id.*)

PRINCIPAL AND AGENT. (*Id.*)

SET-OFF (*Id.*)

VENDOR AND PURCHASER OF CHATEL. (*Id.*)

G.

GENERAL TERM.

2. Two justices of the general term may hold a term and hear and decide an appeal in which the remaining justice is incompetent to sit. (*Van Rensselaer agt. Witbeck*, 2 *Lansing*, 498.)

2. And it seems in the absence of the presiding justice, the two associate justices may hold a General Term. (*Id.*)

3. And that unless there is a failure to agree upon a decision of the appeal by two appellate justices in the department where the judgment or order appealed from is entered, where two of such justices therein are capable of sitting on the appeal, or acting in the matter, there is no authority for the hearing of the appeal in any other department. (*Id.*)

GIFT.

See SPECIFIC PERFORMANCE. (43 *N. Y.*)

STATUTE OF FRAUDS (*Id.*)

PRINCIPAL AND AGENT. (57 *Barb.*)

GOLD COIN.

See BILLS OF EXCHANGE. (43 *N. Y.*)
DELIVERY. (*Id.*)

GOOD CHARACTER.

1. In a criminal trial evidence of the good character of a prisoner is of value not only in doubtful cases, but also when the testimony tends very strongly to establish the guilt of the accused. It will, of itself, sometimes create a doubt, when, without it, none would exist. (*Remsen agt. People*, 43 *N. Y.*, 6.)

2. Accordingly, where the judge charged that good character was a fact to be considered by the jury like every other fact in the case, no matter what the other testimony in the case might be, but when the evidence is positive, leading to a conclusion logically and fairly derived of guilty from all the testimony, the simple fact that a person possesses previous good character will be of no avail:

Held, error. (*Id.*)

GOVERNMENT BONDS.

See HUSBAND AND WIFE. (57 *Barb.*)

GRAND JURY.

See CRIMINAL LAW. (57 *Barb.*)

GUARANTY.

1. Where the defendant guaranteed "the punctual payment of the interest" upon a bond payable in six years and six months from date with interest semi-annually:

Held, that the guaranty only extended to the payment of interest falling due before the time of payment of the principal. (*Hamilton agt. Van Rensselaer*, 43 *N. Y.*, 244.)

2. After the principal sum has fallen due, interest is payable not by the original terms of the agreement, but as damages for a breach of contract. (*Id.*)

See MORTGAGE OF LAND. (2 *Lansing*.)
POWER AND AUTHORITY. (*Id.*)

GUARDIAN AND WARD.

1. Although the statute authorizes a guardian to keep up and sustain the houses, grounds and other appurten-

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- ances to the lands of his ward by, and with the issues and profits thereof, or with any other money of the ward's in his hands, this does not include the right of rebuilding. (*Copley agt. O'Neil*, 57 Barb., 299.)
2. Permission to erect on the ward's land, a building with the right of removal, can be obtained from the guardian; and such permission cannot be given by him as guardian, to himself as an individual. (*Id.*)
 3. A guardian having as such charge of his ward's land, his possession of it is in his capacity of guardian, and not otherwise. He cannot, by a contract with himself, create the relation of landlord and tenant, so as to render his occupation that of a tenant at will. (*Id.*)
 4. If a general guardian makes a purchase in his character as such, he presumptively uses his ward's funds therefor. (*Low agt. Purdy*, 2 Lansing, 422.)
 5. And if, on foreclosure sale of his ward's land, the effect is to merge and distinguish the mortgage, and he can obtain no title by so purchasing, which he can afterward convey without authority from a court of equity. (*Id.*)
 6. But if he can show the purchase to have been made with his own funds he may stand as assignee of the mortgage against his ward till he is reimbursed. (*Id.*)

H.

HIGHWAYS.

See COMMISSIONERS OF HIGHWAYS. (57 Barb.)

1. The omission of an overseer of highways to deliver to the town clerk a list of the inhabitants in his road district liable to work on the highways as provided by section 21 of the statute respecting assessment for highway labor (1 R. S. 506), does not, it seems avoid the assessment made against persons so liable by the commissioners of highways, etc. (*Rinehart agt. Young*, 2 Lansing, 354.)
2. It seems the provision of the statute in this particular, is merely directory. (*Id.*)
3. It seems that the "new inhabitants," whose names "shall from time to time be added to the several lists, etc."

(§ 26), are new inhabitants, not of the road district, but of the town. (*Id.*)

5. And that in respect to all his land situate in the town, each inhabitant thereof is to be assessed for highway labor, in the particular road district in which he has his residence. (*Id.*)
5. But it seems if one who owns land in the same town with his residence but in a different road district, moves his residence to the land without having been assessed in respect thereof for highway labor, his name may be added to the list under section 26 as a name "left out," and be rated accordingly. (*Id.*)
6. The overseer of highways for road district No. 1, of the town of S, neglected to deliver the list required by section 21, to the town clerk of that town, and the commissioners of highways at the proper time prepared a list for the district from the list used in previous years and placed upon it the name of the plaintiff who resided in road district No. 9, of the same town, but owned land in the former district. This list they delivered to the defendant, an overseer of highways for district No. 1, who, when the plaintiff had soon after moved his residence to his land in district No. 1, assessed him for highway labor in respect of such land, and notified him to perform it, which he did in part, refusing to perform the balance; whereupon complaint was made by the overseer, under the statute (§ 41), to a justice of the peace, the plaintiff was summoned, a fine imposed, and warrant issued for the collection thereof (§§ 42, 43), under which his property was levied on and sold.

Held, that the plaintiff could not dispute the validity of the assessment in an action to recover the value of the property sold. (*Id.*)

7. *Beach agt. Furman* (9 John R., 229), distinguished. (*Id.*)
8. *Quere*, whether the overseers of highways in making the assessment, did not act judicially. (*Id.*)

See ASSESSMENT. (*Id.*)

HORSE RAILWAY.

See ASSESSMENT. (2 Lansing.)
INDICTMENT. (*Id.*)

4. If an indictment shows a presentment by jurors "the number and qualification required by law," the names or number of the jury need not be stated

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therein or in the caption. (*McGarry* agt. *The People*, 2 *Lansing*, 227.)

2. And if it is stated that the jurors were "then and there in said court duly sworn, etc.," and presented the defendants upon their oath, it sufficiently appears that the presentment was upon the oaths so sworn. (*Id.*)

3. In an indictment for injuring the property of a corporation, the corporation may be described by its usual and ordinary title, though different from its corporate name. (*Id.*)

4. Where an indictment for obtaining property under false pretences, charged that the prisoner, with an intent to defraud one A G, Jr., did "falsely pretend and represent to the said A G, Jr., for the purpose of inducing the said A G, Jr., to part with a yoke of oxen of the goods and chattels of the said A G, Jr., that," &c., "by which said pretences he," the prisoner, "then did unlawfully obtain from the said A G, J.," the oxen mentioned.

Held, that there was a substantial averment that the prisoner had obtained the property from the prosecutor by means of the false pretences made, and the latter's belief therein, and that the indictment was not defective in that particular. (*Clark* agt. *The People*, 2 *Lansing*, 329.)

5. The case of *The State* agt. *Philbrick* (31 *Maine*, 401), commented upon, and on this point disapproved. (*Id.*)

6. Where it is charged in the indictment that the prisoner obtained the property upon the security of his promissory note, through false and fraudulent representations as to his ability to pay the same, an argument of his neglect to make payment of the note is not essential. (*Id.*)

HUMAN LIFE.

See CONTRIBUTORY NEGLIGENCE. (43 *N. Y.*)

HUSBAND AND WIFE.

See LARCENY. (43 *N. Y.*)

TENANCY BY THE CURTESY. (*Id.*)

1. At common law an action lay against husband and wife jointly, for a libel written and published by the wife, alone; and a general judgment could be rendered against them both, if the charge were established. This rule has not been changed by statute, in this State. (*Tait* agt. *Culbertson*, 57 *Barb.*, 9.)

2. Where government bonds, deposited with the defendants, by the plaintiff, with express instructions not to deliver them to any person except upon his written order, were subsequently obtained from them, by the plaintiff's wife, fraudulently, by means of a forged order purporting to be signed by him; *Held*, that the plaintiff, being legally responsible for the fraud of his wife, he could not recover from the defendants the value of the bonds. (*Kwing* agt. *Manley*. (*Id.*, 479.)

3. The rule of the common law, on this subject, is not changed, or affected by the legislation in this State giving to married women the control of their property. While the recent statutes relieve them from many of the disabilities formerly resulting from the marital relation, they do not discharge the husband from the liabilities which that relation imposed on him for the torts of his wife. (*Id.*)

See MARRIAGE. (*Id.*)

MARRIED WOMEN. (*Id.*)

WITNESS. (*Id.*, 1.)

4. Where, upon the purchase of land by a married woman, through her husband acting as her agent, the husband makes false and fraudulent representations respecting a bond and mortgage given in payment of the purchase money, knowing them to be false; and such representations are material, and the vendor relies upon them, and sustains damages in consequence, an action can be maintained by him, or his assignee, against the wife, for the fraud. (*Graves* agt. *Spier*, 57 *Barb.*, 349.)

5. In such an action the measure of damages is, the difference between the value of the mortgage debt as it would have been had the mortgaged premises been free from all prior incumbrances, as represented, and its value as it turned out to be, with the mortgaged premises incumbered by prior mortgages and judgments. (*Id.*)

6. Where, in such a case, two prior mortgages were foreclosed by action, and the premises sold, in satisfaction thereof, and the same were struck off to the plaintiff's assignor, and an execution issued in an action brought by him upon the bond was returned unsatisfied; *Held*, that the plaintiff was entitled to recover of the defendant the whole amount of the mortgage debt, over and above the surplus arising from the sale under the prior mortgages, with interest on that balance, by way of damages. (*Id.*)

See MARRIED WOMEN. (*Id.*)

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I.

ILLEGAL CONTRACTS.

See CONTRACTS. (43 N. Y.)
PUBLIC POLICY. (*Id.*)

ILLEGAL VOTING.

See CRIMINAL LAW. (57 Barb.)

INDEMNITY.

See COMMON CARRIER. (2 Lansing.)

INDIVIDUAL BANKERS.

See PARTNERSHIP. (43 N. Y.)

INDORSEMENT AND INDORSER

See PROMISSORY NOTES. (43 N. Y.)
WAIVER. (*Id.*)
AGREEMENT. (58 Barb.)
OPINIONS OF WITNESSES. (*Id.*)
BILLS OF EXCHANGE AND PROMISSORY NOTES. (2 Lansing.)

INEVITABLE ACCIDENT.

See NEGLIGENCE. (43 N. Y.)

INFANCY.

1. Where an infant purchase lands and subsequently, before his majority, sells the land, his retention of the proceeds of such sale after he comes of age, is not such an affirmation of his contract, as to render valid against him an obligation given by him as a consideration for the land. (*Walsh* agt. *Powers*, 43 N. Y., 23.)

2. Accordingly, where an infant buys land subject to a mortgage thereon, which, in and by the deed, she covenants to pay as a part of the consideration of the conveyance, and subsequently, but before she comes of age, she conveys the land to another for a larger price, and retains and enjoys the proceeds of such sale for several years after she attains her majority:

Held, she nevertheless is not liable on her covenant to pay the mortgage. (*Id.*)

3. Her appearance in a suit to foreclose the mortgage, as a party defendant, and a judgment of foreclosure against her in that suit, are no bar to her setting up her infancy as a defence in an action against her by her grantor to recover the amount of a judgment

against him for the deficiency, which he had been obliged to pay. (*Id.*)

4. As to conditions to be performed, annexed to an estate, granted either to an ancestor, or himself, the laches of an infant will bar him of his right to the land, the same as if he were an adult. (*Havens* agt. *Patterson*, 43 N. Y., 218.)

See APPRENTICES. 57 Barb.

INHABITANT AND NEW INHABITANT.

See HIGHWAY. (2 Lansing.)

INJUNCTION.

1. Where a motion to dissolve an injunction was made and granted at a regular special term, and without any appeal from that order, and within a day or two afterwards, the same attorneys, upon the same complaint, which had not been newly verified, and with no new or additional affidavit, and without a new undertaking procured from the same judge who had granted the first injunction, upon an *ex parte* application to him, made out of court, and while he was not holding court, and while another judge was holding the regular special term and chambers, another or second injunction of the same tenor and effect of the injunction which had been dissolved, together with an order to show cause thereafter why such last injunction should not be made perpetual:

Held, on a motion to dissolve this second injunction, that the motion be granted with costs to be paid by the plaintiff's attorneys personally; which was the only punishment or reproof which the court could administer to them; as it was doubtful if their misconduct was such as would authorize the punishment prescribed by the statute concerning contempts. (*Schaughnessy* agt. *Reiley*, ante, 382.)

2. To enable a plaintiff to maintain an action against the officers of a county and enjoin the collection of a tax, he must bring his case within some one of the acknowledged heads of equity jurisdiction, viz: (1.) Where the proceedings of the subordinate tribunal will necessarily lead to a multiplicity of actions; (2.) Where they lead, in their execution, to the commission of irreparable injury to the freehold; (3.) Where the claim of the adverse party to the land bought at the tax sale is valid upon the face of the instrument, or the proceedings sought to be set aside, and extrinsic facts are necessary

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to be proven to establish invalidity or illegality; (4.) Where the tax is upon land, and the law allows it to be sold to collect the tax, and the conveyance to be executed would be conclusive evidence of title; (5.) Where the plaintiff has sustained special injury. *Hanlon* agt. *The Board of Supervisors of the County of Westchester*, 57 Barb., 383.)

3. Whenever a case is presented falling within these exceptions, equity will interfere to arrest the excessive litigation, to prevent the irreparable injury, or to remove or prevent the cloud upon the title; where no relief can be had by *certiorari*, to review the proceedings, and unless the plaintiff can have an injunction, he will be without remedy. (*Id.*)

4. Where a plaintiff has had an opportunity to interpose the defense of fraud and corruption in an arbitrator, in an action brought against him upon the award, an injunction will not be issued to restrain the proceedings in that action, either before or after judgment. *Stover* agt. *Cogswell*, 57 Barb., 448.)

5. His remedy is to move, in that action, for such relief as the facts may show he ought to have, in respect to the judgment which has passed against him, therein. (*Id.*)

5. An injunction will not be issued to restrain the prosecution of an action pending in the same court, unless it appears from special circumstances, that relief cannot be had by motion or petition in the cause. (*The Erie Railway Company* agt. *Ramsey*, 57 Barb., 449.)

7. This was decided in *Schell* agt. *The Erie Railway Company*, (51 Barb., 368,) and that is all that it was intended by the court to decide, there, viz: that such an injunction is irregular. (*Id.*)

See TRADE MARKS. (*Id.*)
WATER. (58 Barb.)
CONTEMPT. (2 Lansing.)
CORPORATION. (*Id.*)
DEED. (*Id.*)

INNKEEPER.

1. At common law, innkeepers are insurers of the property of their guests. (*Ramaley* agt. *Leland*, 43 N. Y., 331.)

2. Under our statutes laws of 1855, chap. 42, innkeepers who have provided a safe, and posted notices of the fact in accordance with the act, are

exonerated from liability for "money, jewels and ornaments," of a guest not deposited in a safe. (*Id.*)

3. But the exemption is limited to the particular species of property named, and being in derogation of the common law, cannot be extended in its application by doubtful construction:

Held, accordingly, that the watch of a guest at an inn, worn and used by him in the ordinary manner, is neither a "jewel or ornament" within the meaning of the act, and that the innkeeper is liable for the loss thereof in the room of the guest, notwithstanding compliance with the act of 1855. (*Id.*)

INSOLVENCY.

1. The legal meaning of "insolvency" defined. *Van Riper* agt. *Poppenhausen*, (43 N. Y., 68.)

See EQUITABLE SET-OFF. (*Id.*)

INSOLVENT CORPORATIONS.

See PRACTICE. (3 Lansing.)

INSOLVENT DEBTORS

See COUNTY COURT. (57 Barb. FRAUD. (*Id.*))

1. An order of a county court (under art. 6, title 1, chap. 5, part 2, R. S.), directing the discharge of a debtor imprisoned in execution, is invalid on its face, unless it recites the proceedings necessary under the statute to vest the court with jurisdiction. (*Bullymore* agt. *Cooper*, 2 Lansing, 71.)

2. If the sheriff releases the debtor under an order omitting such recitals, when the court in fact had not jurisdiction to make it, he renders himself liable as for an escape. (*Id.*)

2. The court will not obtain jurisdiction to make the order of discharge unless the applicant verifies his petition at the time he presents it. (*Id.*)

4. Where, therefore, the sheriff released a prisoner in execution, under an order whose recitals showed the applicant's neglect to swear that he had not disposed of any part of his property with a view to the future benefit of himself or his family, and the order had in fact been made upon a petition which was not verified at the proper time, and was for that reason void.

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Held, that he was not protected, but was liable for an escape. (*Id.*)

5. Whether the applicant for discharge can meet the requirements of the statute (§ 4), respecting "a true and just account of all his estate, etc." by alleging in his petition an adjudication and assignment in bankruptcy. *Quere.* (*Id.*)
6. If an insolvent, who is carrying on business with knowledge that he can no longer continue it, and that his property must be surrendered to his creditors, purchases goods upon credit without disclosing the circumstances to the vendor, his concealment thereof is equivalent to fraud, and his assignment of the purchased property for the benefit of his creditors will pass no title therein to his assignee. (*Chaffee agt. Ford, 2 Lansing, 81.*)
7. And this is so, although the purchase is made in the course of the purchaser's business. (*Id.*)
8. The same rule applies to a banker, who under like circumstances receives the money of his depositor. (*Id.*)

INSURANCE.

See ACCIDENT INSURANCE. (43 N. Y.)
FIRE INSURANCE. (*Id.*)
LIFE INSURANCE. (*Id.*)

1. A party holding a contract for the purchase of premises from the owner, on which he has made payments, has an insurable interest in the premises. *Acet agt. The Merchant's Insurance Co. of Hartford. (57 Barb., 68.)*
2. And although a third person, to whom such party has contracted to sell the premises, has without his consent, obtained a conveyance from the owner, this will not affect the party's rights. Such third person, having full knowledge of those rights, will hold the title subject thereto. (*Id.*)
3. Such party still has the equitable title, until his rights are adjusted. His right is not a conditional right, but an absolute right, to the extent of his ownership, or equitable title. He is therefore not guilty of any fraud which will vitiate a contract of insurance, in representing himself as the owner of the property. (*Id.*)
4. A policy of insurance, issued to the plaintiff by the defendant, contained this condition: "If the assured, or any other person or parties interested shall have existing, during the continuance of this policy, any other contract or agreement for insurance, (whether valid or not,) against loss or damage by fire, on the property hereby insured, not consented to by this company," &c., "then this insurance shall be void and of no effect," &c. *Held*, that the "other persons or parties interested," specified in the condition, referred to parties interested in the plaintiff's insurance, merely; and that it was not the understanding or intention that any other person who might have a separate interest in the property, and not connected in interest with the plaintiff, and having no interest in his insurance, might avoid the plaintiff's contract by obtaining an insurance of his own interest in the property, without the plaintiff's knowledge or consent. (*Id.*)
5. The omission of a party insured to deliver a particular account of his loss and damage, as required by one of the conditions annexed to the policy, is fatal to his right to recover upon the policy. (*Owen agt. The Farmer's Joint Stock Ins. Co, 57 Barb., 518.*)
6. Such a provision is a condition precedent, the performance of which, by the insured, is indispensable to his right of recovery, unless it has been dispensed with, or waived by the insurers. (*Id.*)
7. Time is of the essence of the contract, in conditions of this kind and there is no power in the court to dispense with the condition, or excuse the nonperformance of it. (*Id.*)
8. It is only when a duty is created by the law that a party is excused from performing it, if performance is rendered impossible by act of God, and not when the duty is created by contract. (*Id.*)
9. Conditions of this kind, in a policy of insurance, are designed and inserted for the benefit of the insurer, and may be waived by him, and the courts should construe them most liberally in favor of the assured, and most strictly against the insurer. (*Id.*)
10. A policy contained a condition that in case of loss, the assured should deliver a particular account thereof to the insurers within ten days. A loss occurred on the 20th of May, 1868. Notice was given, immediately afterwards, to the agent of the insurers at the place where the premises were situated. On the 10th of June, the insurers' general agent and adjuster of losses, with one of the directors and a member of the executive committee, came to the place where the premises

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were situated, for the purpose of settling the loss. On the 1st of July said agent came a second time, stating that he came to adjust the loss. Being told that the assured was absent, and that the proofs of loss had not yet been prepared, he said it would make no difference; that the proofs could be made up and sent when the assured returned. Upon the return of the assured, on the 14th of August, the proofs were mailed to the insurers, who, after keeping them ten days, returned the same to the assured, then informing him for the first time, that they intended to contest the claim. *Held*, that these facts constituted a distinct recognition of the liability of the insurers for the loss, after the expiration of the ten days for the service of the preliminary proof. And that this was sufficient to establish a waiver of such proof within the ten days. (*Id.*)

1. The general agent of an insurance company has power to bind the company, by making such a waiver. (*Id.*)
12. The fact that insurers, after the time for furnishing the preliminary proofs has expired, put their resolution to contest the claim upon other grounds than the omission to furnish such proofs, is a waiver of that ground of defense. (*Id.*)
13. A policy of insurance was taken at the instance of the insurer's agent, and in exchange for one he had previously issued as the agent of another company. The application was written by such agent, and the name of the assured was put to it by such agent. It was stated therein that there were no incumbrances on the property. It was shown that nothing was said by either party about any incumbrance or lien by judgment, when inquiry was made about incumbrances; or any thing suggesting any necessity or occasion to speak about judgments. *Held*, that the inquiry suggested in the application, in respect to incumbrances, was in fact, and should be in law, limited to mortgages, or incumbrances, creating a specific lien on the land. And that the assured was not called upon to say anything about judgments. (*Id.*)
14. *Held*, also, that in this view of the statement in the application that there was no incumbrance on the property—whether it were viewed as a warranty or as a representation—there was in fact no intentional concealment or misrepresentation, although there were, at the time, judgments which were liens upon the premises; and that the refu-

sal of the judge to nonsuit upon that ground was not erroneous. (*Id.*)

15. When asked if the premises are incumbered, the applicant in his answer, need go no further than to mention all specific liens upon the land by mortgage, contract to sell, charges upon the property by will or otherwise, or certificate of sale by the sheriff, if the premises have been sold on execution upon any judgment. (*Id.*)
16. Where a policy of insurance against loss by fire runs to the "assured, his executors, administrators and assigns," an action is properly brought, after the death of the assured, in the name of his administrator, if a right of action has accrued to any one by reason of the destruction of the property insured. (*Loppin v. The Charter Oak Fire and Marine Insurance Co.*, 58 Barb., 325.)
17. The administrator, in such a case, prosecutes for the benefit of the person or persons entitled to the moneys recovered on account of such loss; provided the contract remains in force; notwithstanding the change of title to the property insured. (*Id.*)
18. A contract of insurance provided that the policy should not be assignable before or after loss, without the consent of the company, manifested in writing thereon; that "in case of assignment without such consent, whether of the whole policy, or of any interest in it, the liability of the company shall then cease;" "that in case of any sale, transfer or change of title in the property insured, * * * or of any interest therein, such insurance shall be void and cease;" "and that in case of the entry for foreclosure of a mortgage, or the levy of an execution, or attachment, or possession by another of the subject insured, without the consent of this company, indorsed hereon, this instrument shall immediately cease." The policy was for one year from December 7, 1867, and was renewed for one year from the latter date. On the 21st day of July, 1869, and during the life of the policy, the assured died intestate and the property insured descended to his heirs at law. On the 9th of November, 1869, a total loss of the property by fire occurred. No consent had been indorsed upon the policy by the company, at the time of the fire, and there had been long before, not only possession by others than the assured, of the subject insured, but a complete change of title, also. *Held*, that the policy, by the clear and explicit terms

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and provisions thereof, became void and ceased to have any binding force upon the death of the assured, and the vesting of the title to the property insured in his heirs at law. That this was a change of title, from the assured to others, which brought the case within the express terms of the policy. (*Id.*)

19 *Held, also*, that the possession of the property insured, by others than the insured, without the consent of the company indorsed upon the policy, also produced the same result. It put an end to the contract, and rendered it no longer obligatory. (*Id.*)

20. Where the description of the property insured is made a part of the contract, and a warranty by the assured, and it is expressly provided, among other things, that in case of any misrepresentation or concealment, or omission to make known any fact which increases the hazard, the insurance shall be void; and the property is described and insured as a *dwelling-house*, when in fact it is used in part as a *saloon*, which increases the risk; it seems the policy is void and of no effect, by reason of this misrepresentation. (*Id.*)

21. After a life insurance policy has become forfeited, by its terms, by the non-payment of premiums, in an action thereon it is incumbent upon the plaintiff to show a receipt of the premium, by some one authorized to receive it, after forfeiture; or to show a ratification of an unauthorized receipt, by the company, by an acceptance of the money with knowledge of the facts, or in some other way. (*Kolgers vgt. The Guardian Life Insurance Company*, 58 Barb., 185.)

22. The fact that a clerk of the insurers had power to bind them by receiving money upon policies, is no evidence of his authority to waive a forfeiture by receiving the premium after a policy has ceased to exist, by reason of non-payment; especially where it appears that such clerk had always had strict orders to collect no premiums on forfeited policies; and that the company has never received the premiums so collected by him after forfeiture. (*Id.*)

23. In an action upon a policy, the charter and by-laws of the company are admissible in evidence, to show who was authorized to remit forfeitures. (*Id.*)

24. By the terms of a marine policy of insurance, the insurers were liable

only for an absolute or total technical loss. The policy contained the following warranty: "Warranted by the assured free from loss or claims on account of capture, seizure, detention, or destruction by or arising from any belligerent nation, or from any seceding or revolutionary state or states of the union, or from any guerrilla party, or by or from any officer, civil or military, or other persons claiming to act in their name or under their authority, or in their behalf." The perils insured against were those of the "seas, winds, waves, rocks, sands, shoals and coasts, collisions and sinking at sea, fires, jettisons, loss by pirates, rovers or assailing thieves, barratry of the master and marines, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said vessel, or any part thereof, occasioned by sea perils".

Held, 1. That the forcible taking possession of the vessel by the officers of the United States government, with the intent to appropriate it to the use of the government for a specific purpose, viz., the carrying of a cargo to Santiago, amounted to a capture; and that the warranty in the policy did not extend to such capture. 2. That the grammatical structure of the sentence containing the warranty precluded any such extension, and no reason was apparent why the construction of the clause should not be according to that structure. (*Murray vgt. Receivers of the Harmony Fire and Marine Ins. Co.*, 58 Barb., 9.)

25. And the vessel having been lost while thus in the service of the government, by stranding, and the insured having without any previous abandonment, made a claim on the United States government for payment for the vessel, by reason of her loss while in the possession of the government officers, which claim was allowed and paid, to an amount nearly equal to the whole value of the vessel:

Held, that these circumstances caused the capture to cease from operating as a total loss; and that the insurers being liable, under the policy, only in case of a total loss, it was immaterial whether they had insured against capture, or not:

Held, also, that if the assured had desired to make the constructive total loss arising from the capture, an actual total loss, so far as the insurance was concerned, they should have abandoned; in which case the insurers would have been entitled to the sum

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paid by the government; but that they, not having done so, but choosing to hold on to their property in the vessel, and to accept the sum paid by the government, could not claim to recover of the insurers as for a total loss. (*Id.*)

26. If the assured, before abandonment, either recovers the subject insured, or receives an indemnity for its loss, he cannot thereafter elect to abandon. (*Id.*)

See ACCIDENT INSURANCE. (2 *Lansing.*)
POLICY OF INSURANCE. (*Id.*)
PREMIUM NOTE. (*Id.*)

INTEREST.

1. Where the defendant guaranteed "the punctual payment of the interest" upon a bond payable in six years and six months from date with interest semi-annually:

Held, that the guarantee only extended to the payment of interest falling due before the time of payment of the principal. (*Hamilton* agt. *Van Rensselaer*, 43 N. Y., 224.)

2. After the principal sum has fallen due, interest is payable not by the original terms of the agreement, but as damages for a breach of contract. (*Id.*)

See ACCOUNT STATED. (2 *Lansing.*)
EJECTMENT. (*Id.*)
EXECUTORS AND ADMINISTRATORS. (*Id.*)

INTERNAL REVENUE.

See STAMPS. (43 N. Y.)

INTERNATIONAL LAW.

See BILLS OF EXCHANGE. (43 N. Y.)
PARTNERSHIP. (*Id.*)

INVESTMENTS.

See EXECUTORS AND ADMINISTRATORS. (2 *Lansing*)

IRRELEVANT AND REDUNDANT MATTER.

1. In an action against a trustee of a manufacturing corporation to charge him with the liability of a debt due from the company to the plaintiff, on the ground of failure and neglect of the company to file their annual report as required by law, the allegations in

the complaint that the plaintiff has recovered judgment against said company for said debt, and issued execution thereon which has been returned unsatisfied, will be stricken out as irrelevant. (See, to the same effect, *McHarg* agt. *Eastman*, 35 How., 207.) *Weymouth* agt. *Dimock*, ante, 92.)

2. No appeal lies from an order denying a motion to compel a party to make his pleading more definite and certain, and to strike out irrelevant and redundant matter contained therein. (*Field* agt. *Stewart*, ante, 95.)

3. An order of the special term, denying a motion to strike out certain allegations of the complaint as irrelevant, is not appealable to the general term. (*Hughes* agt. *Mercantile Mut. Ins. Co.*, ante, 253)

J.

JEWELS AND ORNAMENTS.

1. What are under innkeepers' statute of 1855 See INNKEEPERS. (43 N. Y.)

JOINDER OF ACTIONS.

See PLEADING. (2 *Lansing*)

JOINT AND SEVERAL DEBTORS.

1. In an action on a promissory note against the two joint makers thereof, one of whom establishes a defense on the ground of coverture, judgment may go against the other defendant. (*McGuire* agt. *Johnson*, 2 *Lansing* 305.)

See ACTION. (*Id.*)
PARTNERSHIP. (*Id.*)
PAUPER. (*Id.*)

JOINT STOCK ASSOCIATION.

See CORPORATION. (2 *Lansing.*)
PLEADING. (*Id.*)

JUDGE'S CHARGE.

See FRAUD AND FRAUDULENT SALES. (2 *Lansing.*)
VERDICT. (*Id.*)

JUDICIAL ACT.

See HIGHWAY. (2 *Lansing.*)

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JUDGMENT.

1. No principle of law is better settled than that a judgment rendered without the court that renders it having obtained *jurisdiction* of the subject matter to which it relates, and of the persons to be bound thereby, is *utterly void*. (*Phelps* agt. *Baker*, ante, 237.)
 2. This principle of law applied in this case, where a judgment in favor of the plaintiff for *alimony* obtained in the state of Ohio, against the defendant, who had never resided in that State, nor appeared in the action, nor been served with process, except by *publication in a newspaper*, which notice never came to defendant's knowledge until after the rendition of the judgment, and the sale of his property by virtue of an attachment issued under it in this state. (*Id.*)
 3. The judgment of the county court in Ohio is void in this state, as to the alimony, whatever its effect may be upon the marriage. (*Id.*)
 4. There is no doubt of the power of the court to set aside the judgment, upon motion, where it clearly appears that the plaintiff had no legal cause of action. (*Id.*)
 5. *Posting citations in public places* within the jurisdiction of the court in which proceedings to obtain judgment are instituted, can confer no legitimate jurisdiction over foreigners who are non residents, and do not appear to answer the suit, whether they have notice of the suit or not. The effect of such proceedings are purely local, and elsewhere they will be held to be mere nullities. (*Id.*)
 6. *Service by publication* is valid within the jurisdiction by whose laws it is authorized, but of no validity beyond it. (*Id.*)
 7. It has been repeatedly held that where the suit is commenced by the *attachment of property*, that the judgment record therein is valid, so far as the title to the property attached is concerned, but utterly inoperative as to the defendant for any other purpose, who has not appeared or been personally served with process. (*Id.*)
 8. An equitable claim on land, which existed prior to the recovery of a judgment, is given a preference over judgments docketed afterwards; but in no case is that preference given where the equitable right did not exist prior to the recovery of the judgment. (*Cook* agt. *Kraft*, ante, 279.)
 9. There is no principle of equity by which a purchaser of real estate or of a lease, which, at the time of the purchase is subject to the lien of a judgment, (as in this case) can claim *improvements subsequently made* by him, although without knowledge of the judgment to be exempt from the lien. (*Id.*)
 10. Payment of, for money, is within the terms of a bond, conditioned that the defendant "obey and perform the orders of the court." (*Clafin* agt. *Ball*, 43 N. Y., 481.)
- See FORMER JUDGMENT. (*Id.*)
BILLS OF EXCHANGE. (*Id.*)
11. Where a verdict is according to the very right of the case, upon the facts found, the judgment will not be disturbed on any question of form, when there is no exception involving any error in matter of law. (*Rainsford* agt. *Rainsford*, 57 Barb., 58.)
 12. A judgment rendered by a justice of the peace, on a dilatory plea, viz., upon an issue as to the misjoinder of parties, although it terminates the action, does not affect the right of action on the merits; nor can it be set up as a bar to a subsequent action for the same cause. (*Vaughan* agt. *O'Brien*, 57 Barb., 491.)
 13. Where a judgment is reversed, on appeal, upon technical grounds not involving the merits, the action constitutes no bar to a second action for the same demands. (*Id.*)
 14. A simple judgment of reversal has the same effect, in that action, as a judgment of nonsuit. And where the ground of reversal does not appear, the onus of proof is on the party who, in a subsequent suit, relies upon the adjudication as a bar. He must make it appear that the precise point was considered and passed upon in the former suit. (*Id.*)
- See CORPORATIONS. (*Id.*)
INSURANCE, (FIRE.) (*Id.*)
JUSTICE OF THE PEACE. (*Id.*)
MECHANICS' LIEN LAW. (*Id.*)
PRACTICE. (*Id.*)
APPEAL (58 Barb.)
JUSTICE OF THE PEACE. (*Id.*)
- JUDGMENT CREDITORS.
- See PRACTICE. (57 Barb.)
- JUDGMENT DEBTORS.
- See ACTION. (2 Lansing.)
PLEADING. (*Id.*)

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JURISDICTION.

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7. It has been repeatedly held that where the suit is commenced by the *attachment of property*, that the judgment record therein is valid, so far as the property attached is concerned, but utterly inoperative as to the defendant for any other purpose, who has appeared or been personally served with process. (*Id.*)
8. When a court of equity obtains jurisdiction of an action for any purpose for which it is authorized to give judgment, it holds such jurisdiction for every other purpose; especially for the purpose of giving effect to its judgment. (*DeBemer agt. Drew, 57 Barb., 438.*)

9. Hence, if the court has obtained jurisdiction of an action against a foreign corporation by its appearance by attorney, it has power, after judgment rendered in such action and execution returned unsatisfied, to appoint a receiver of the property and effects of the corporation. (*Id.*)

See ATTACHMENT. (*Id.*)
 CORPORATIONS. (*Id.*)
 PRACTICE. (*Id.*)
 DIVORCE. (58 Barb.)
 APPEAL. (2 Lansing)
 INSOLVENT DEBTOR. (*Id.*)
 NON-IMPRISONMENT ACT. (*Id.*)

JURY.

1. Where the juror is challenged to the favor, although the facts proved before the triers would be ground for challenge for principal cause, yet the question of competency belongs exclusively to the triers, and the court cannot be called upon to rule, as matter of law, that the juror, upon the facts proved, is incompetent. (*People agt. Allen, 43 N. Y., 28*)
2. An opinion formed as to the general character of the prisoner does not *per se* disqualify a juror. (*Id.*)

See CRIMINAL LAW. (57 Barb.)
 RAILROAD COMPANIES. (*Id.*)
 STREETS AND AVENUES. (*Id.*)
 STOCK. (58 Barb.)

JURY AND JURY TRIAL.

1. It seems that if a prisoner has not, under the act of 1869 (chap. 678) offered his own testimony upon his trial, it is error if the court against his objection, permit the counsel for the prosecution in addressing the jury, to comment on the omission as a circumstance against him, or a fact to be considered in determining the case. (*Crandall agt. The People, 2 Lansing, 309.*)

See EVIDENCE. (2 Lansing.)

JUSTICE OF THE PEACE.

1. Where a justice of the peace, after rendering a judgment in favor of the plaintiff, by mistake entered the same in his docket as a judgment in favor of the defendant, and a transcript of such judgment being filed and docketed in the county clerk's office, the plaintiff was compelled to pay the judgment:

Held, that an action could be maintained by the latter, against the justice, as for

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an act of ministerial negligence and carelessness by which the plaintiff had been directly injured. (*Christopher agt. Van Liew, 57 Barb., 17.*)

2. Such a case does not fall within the rule of judicial impunity for acts done by a judicial officer in the trial of causes and rendition of judgments; it being settled that the act of entering the judgment in the docket, by a justice, is a ministerial act, and is no part of the judicial function of rendering the judgment. (*Id.*)

3. Where a justice swore that from the evidence before him in a case he "found his judgment against the defendant and in favor of the plaintiff, for the sum of, &c., but upon entering said judgment in his docket he by mistake inserted the name of the defendant in the place of that of the plaintiff:

Held, that this was to be understood as an averment that the justice had reduced his judgment to form, by his official act, and then made the mistake in entering the judgment so formed, upon his docket; and that the error was ministerial:

Held, also, that the justice had the right to correct such a mistake in his docket, the moment he discovered it; the error being merely clerical. (*Id.*)

See AGREEMENT. (Id.)
APPRENTICES. (Id.)
JUDGMENT. (Id.)

4. Where a justice of the peace, acting as a court of special sessions, and having jurisdiction of the person of the defendant, and of the offense with which he is charged, imposes upon him, by way of punishment, a larger fine than he has a right to inflict, the defendant may have the erroneous judgment and sentence against him reversed and vacated, upon *certiorari* from the court of sessions of the county, if he sees fit to pursue that remedy. But, after such fine has been paid, no action will lie against the justice to recover back the amount. (*Clark agt. Holdridge, 58 Barb., 61.*)

5. Such a judgment is clearly erroneous, and voidable, but not void absolutely. (*Id.*)

6. Where a justice acts without jurisdiction he is a trespasser; but, having jurisdiction, an error in judgment will not subject him to an action; as where, having authority to inflict a fine, he errs in the exercise of it, in measure or degree, only. In every such case, the principle of judicial irresponsibility protects the magistrate. (*Id.*)

7. After a fine imposed by a justice, acting as a court of sessions, has been paid by the defendant, to the justice, to avoid imprisonment, and by the latter paid over to the county treasurer, the justice will be deemed to have received it in his judicial capacity, to and for the use of the county, and, until the judgment is avoided by reversal, no action will lie against him to recover it back, although such fine was for a larger amount than the law allowed. (*Id.*)

See NON-IMPRISONMENT ACT. (2 Lansing.)
PRACTICE. (Id.)

JUSTICE'S COURT.

1. Where *summary proceedings* are instituted by the landlord against the tenant for holding over after the expiration of his term, and a trial is had and the whole case submitted to the justice for his decision, and thereafter the justice, on motion of the landlord *discontinues* the whole proceedings; such decision of discontinuance is no bar to an action brought subsequently by the landlord against the tenant for *rent and damages* for the use and occupation of the premises. (*Gillilan agt. Spratt, ante, 27.*)

2. The principles involved as to the effect of nonsuits, discontinuances or withdrawals of actions, pending before justices of the peace, in cases tried and submitted to them upon the merits, within the time prescribed by statute for decision, have no application to such a case as this. (*Id.*)

3. Justices' courts have had jurisdiction of a class of cases known as trespass or trover, for a limited amount since the organization of the government, and the mere form of an action does not affect their jurisdiction. (*Crouse agt. Walrath, ante, 86.*)

4. The legislature as the law-making power, have the right to increase the jurisdiction of justices' courts, if they do not violate the provisions of the constitution. (*Id.*)

5. Subdivision 10 of section 53 of the Code of Procedure is not obnoxious to the provisions of the constitution, nor in conflict with the 2d section of article 1 of the constitution, with reference to trial by jury. (*This is adverse to the case of Baxter agt. Putney, 37 How., 140.*) (*Id.*)

6. If in fact the sum total of the accounts of the parties exceeds \$400, it is not necessary that the action be first brought

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in a justice's court, and that the amount of the accounts should be there shown by proof to exceed \$100. The jurisdiction of the justice's court may be shown by the pleadings. (*Lund agt. Broadhead, ante, 146.*)

7. Where the complaint alleged, substantially, that the plaintiff rendered labor and services to the defendants at agreed prices to the sum of \$150, and then admitted or alleged that the defendants have a counter-claim or set off to the plaintiff's account of \$109 13, leaving an amount due the plaintiff of \$40 87, which has not been paid. (*Id.*)

8. And the defendants in their answer admit all the material allegations in the complaint, except that they deny that they ever refused the plaintiff an accounting and settlement of the accounts, and allege that the plaintiff and defendants have had an accounting and settlement thereof, and that the balance as stated in the plaintiff's complaint, is still unpaid. (*Id.*)

9. And the referee, to whom the cause was submitted upon the pleadings—no other evidence being given, found that the account of the plaintiff exceeded the account of the defendants by the sum of \$40 87, and directed judgment for plaintiff accordingly; *held*, that the plaintiff was entitled to costs. (*Id.*)

10. The defendants, to avoid liability for costs, should have answered that they had paid the sums on account of the plaintiff's work, and not admitted that they had an account by way of set-off or counter-claim. (*Id.*)

11. Payments extinguish the claim or demand of the creditor *pro tanto*. (*Id.*)

12. A short summons can only be issued by a justice of the peace, against a defendant, who comes within that class of persons, who, by the non-imprisonment act of 1831, cannot be proceeded against by long summons or warrant. And a plaintiff to bring him self within that provision, it must be made to appear to the justice by affidavit. (*Rue agt. Perry, ante, 385.*)

13. This short summons, therefore, is an extraordinary process, and can only issue on proper preliminary proof; and as no jurisdiction is obtained without such proof, a judgment in this inferior court is to be presumed void, until the party upon whom the *onus* is thrown supplies that proof. The mere memorandum short summons upon the justice's docket alone, does not furnish the evidence that the justice had jurisdiction. And where there is no ap-

pearance on the part of the defendant there is no waiver of the objection. (*Id.*)

14. But on appeal such a judgment ought not to be reversed, where it appears that it was offered in evidence, on the trial, and the defendant's counsel not only permitted the docket to be read in evidence without objection, but admitted it to be evidence, and the validity of the judgment was not raised on the trial, nor the justice's attention directed to any want of validity in it, and it was not made a matter of contest. (*Id.*)

15. The party is to be presumed, after judgment, to have waived any objection that he might have taken on the trial, but omitted to take. (*Id.*)

L.

LANDLORD AND TENANT.

1. Where the lessor has, at the time of giving the lease, no title to the land leased and enters into no covenant, express or implied, for quiet enjoyment except against his own acts, his subsequently acquired title does not enure to the lessee by virtue of the lease; but the latter holds the premises as against the lessor by virtue of the latter's personal covenant, which operates by way of estoppel only to prevent his interference with the lessee's possession, and in no way binds him to protect the lessee against the foreclosure of previous liens upon the property: *Barr agt. Stenton, 43 N. Y., 462.*)

2. Accordingly, whatever may be the rule where there is a general covenant for quiet enjoyment, express or implied, in the lease, and where, at the time of the lease, the lessor actually has the fee out of which an estate for the lessee has been carved, yet, in the case stated above, a mortgage upon the premises having been foreclosed, and the question arising between the lessor and lessee as to the surplus moneys arising on such foreclosure:

Held, as between them, the lessor was entitled to the whole, the lessee having no right to any portion thereof. (*Id.*)

See TENANCY AT WILL. (*Id.*)
LEASE. (*57 Barb*)

3. It is well settled in this state that a tenant cannot dispute the title of his landlord, unless some change has taken place in the landlord's title subsequent

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to the taking of the lease. (*Bigler agt. Furman*, 38 *Barb.*, 545.)

4. The only case in which a tenant who has not entered on the premises may set up want of title in his landlord, is where he was induced to accept possession, or to enter into the lease, by fraud or mistake. (*Id.*)
5. The plaintiff made with the defendants then in possession, and assuming to contract as agents, a parol agreement for the purchase of land, and its occupancy until the agreement should be fulfilled, and entered under the agreement, and planted oats. He was then expelled from possession by the defendants, who in due season harvested the oats, after forcibly preventing him from harvesting them, and he brought this action to recover their possession.

Held, that the plaintiff was rightly nonsuited. (*Harris agt. Frink*, 2 *Lansing*, 35.)

6. He did not occupy as tenant, and had no legal title, as such, to the oats which had been planted by him. (*Id.*)
7. A tenant for years has an equitable interest to the extent of the value of the remainder of his term, in the surplus moneys arising upon a sale of the demised premises, under a mortgage given thereon, prior to his lease, where the lease is cut off by the foreclosure; and the court will order payment out of such surplus to him or to a mortgagee of his lease, after satisfaction of any dower right or other prior claims upon the equity of redemption. (*Clarkson agt. Skidmore*, 2 *Lansing*, 238.)
8. The decision in *Burr agt. Stenton* (52 *Barb.*, 377), held not to control the decision of this case. (*Id.*)

See EJECTMENT. (*Id.*)

LARCENY.

1. It is an established principle of criminal law, that to constitute the crime of larceny, the taking must be under such circumstances that the owner might maintain trespass; and therefore, that the prosecutor must have been in the actual or constructive possession of the property at the time of the taking. (*People agt. McDonald*, 43 *N. Y.*, 61.)
2. But where the property is received and carried away by the prisoner, with a felonious intent, from a person who is the agent for, or who stands in the position of the owner in respect to the

possession, although the owner has never had the actual possession, yet the possession of such person is deemed his, and the crime is larceny. (*Id.*)

3. Accordingly, where the prosecutor, having a draft for gold coin drawn upon a banker, accompanies the prisoner, who took the draft, under the pretense of aiding in getting it cashed, to a broker, who, upon the prisoner's indorsing the draft, undertook to get the gold upon it, and to deliver the gold to the prosecutor at a later hour on the same day, and the broker having obtained gold coin for the draft, the prisoner returned to the broker's office and received the gold in the absence of the prosecutor, and before the appointed hour, and converted it to his own use:

Held, the jury having found as a fact, that the prisoner, at the time he received the draft, had the felonious intent of converting the proceeds to his own use, that the possession of the coin by the broker was so far the possession of the owner, that the prisoner was guilty of larceny in receiving and taking it away. (*Id.*)

4. Where the prisoner claims that the taking of the husband's personal property was with the consent of the wife, and therefore not larcenous, it is for the jury to say, from all the circumstances connected with the transaction, as the knowledge by the prisoner of the close vicinity and near return of the husband to the place of taking, and that the property was owned by the husband, and not the wife, whether the prisoner received the property from the wife, believing that she had any right or authority to deliver it. And it is not necessary to render such taking larcenous, that the property should be appropriated to facilitate adulterous intercourse with the wife. (*People agt. Cole*, 43 *N. Y.*, 508.)

See BURGLARY. (*Id.*)
CRIMINAL LAW. (57 *Barb.*)

LEASE.

See COVENANTS. (43 *N. Y.*)
LANDLORD AND TENANT. (*Id.*)

1. On the 28th of September, 1847, the defendant took a lease of certain premises from the plaintiff for twelve years, covenanting to pay rent therefor. Under this lease he took or accepted possession, and repeatedly paid rent. He never relinquished this possession, never paid rent to any other landlord,

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never attorned to any other landlord, and was never ousted or disturbed in the possession which he held under the plaintiff:

Held, that it was no defense to an action upon the lease, for rent, that the defendant, when he took such lease from the plaintiff, was in fact holding under an old lease from G., which he delivered to the plaintiff, but upon the understanding that if it turned out that the plaintiff was not the owner of the land the old lease was to be restored and the rent money paid back; that one C. was in fact the owner, at the time the lease was given, and that the defendant then informed the plaintiff that C. claimed the land. (*Hardy* agt. *Akerly*, 57 *Barb.*, 148.)

2. The title of C., relied on as a defense, was at most an equitable title, claimed to arise under an agreement with W. C., the plaintiff's grantor, made prior to the lease, sued on whereby C. agreed to convey to W. C. certain city property in exchange for lands in Ulster county, which C. was to select. C. did so convey, and selected this farm, among others, and W. C.'s agent executed a sort of livery of seisin to him, by plucking some tufts of grass, and stating that he delivered possession to C.:

Held, that this was insufficient to defeat the plaintiff's action; C. having never in fact taken possession, nor undertaken to enforce payment of the rent; and having never had the legal title, which remained in W. C. until it was transferred by him, by deed, to the plaintiff. Under such circumstances the defendant should not be heard to dispute the title of the plaintiff: (*Id.*)

Held, also, that there having been no eviction of the tenant, no paramount title shown, and no attornment to the party holding a paramount title, it might well be doubted whether the defendant could defend under a paramount title without divesting himself of the possession acquired from the plaintiff. (*Id.*)

3. The only ground upon which it can be held that a party obtaining a conveyance or lease of land may be compelled to hold the same as trustee for another, is where such party stood in a confidential relation to the other and has used such relation to his own advantage. (*Stiner* agt. *Stiner*, 58 *Barb.*, 643.)

4. Where no fraud is shown, in fact, and no relation exists between the parties, in which either owes a duty to the

other, and no breach of trust or confidence is shown, whatever advantage one may gain over the other by a sharp bargain, or an overbidding against him, cannot be interferred with. (*Id.*)

5. If a fraud is practiced upon a landlord, by one desirous of obtaining a lease of the premises from him, the lessor may in equity set aside the contract; but no such right accrues to another person from the fact that he also was desirous of obtaining a lease of the same premises, and had applied for one, but had made no agreement therefor, and that the other obtained the same by taking advantage of the lessor's mistake taking the lessee for him. (*Id.*)

6. Under such circumstances, the party obtaining the lease owes the other no duty, and the latter has acquired no right to a lease; and between them there is no relation of confidence which can create the obligations that arise from a trust. Hence, there is no principle of equity which will allow the court to adjudge the lessee to stand in the relation of the trustee to him; even though in negotiating for such lease, the lessee concealed the fact that he did not represent the other party, with whom the lessor supposed himself to be dealing. (*Id.*)

7. Where, in an action against a lessee, for fraud in obtaining a lease, which the plaintiffs were anxious to procure for themselves, the finding of the court, upon conflicting evidence, was that the defendant did not intentionally or fraudulently divert the lease from the plaintiffs; nor did he know, prior to its execution, that the lessor meant it to be a lease to the plaintiffs; nor did he in any way fraudulently suppress the truth, in the premises:

Held, that this finding was conclusive upon the question of fraud. (*Id.*)

LEASE IN FEE.

See EJECTMENT. (2 *Lansing*.)

LEGACY.

See WILL. (57 *Barb.*)

LEGISLATURE.

1. The legislature is not restricted in power, by the constitution, from controlling or changing the term, or the fees, of an office; or from abolishing an office created by it, altogether. The incumbent possesses no vested right in

an office. (*The People ex rel. Wilbur* agt. *Eddy*, 57 Barb., 203.)

See CORPORATIONS. (*Id.*)

POWER. (*Id.*)

STREETS AND AVENUES. (*Id.*)

LESSOR AND LESSEE.

See LANDLORD AND TENANT. (43 N. Y.)

LETTERS.

See EVIDENCE. (53 Barb.)

LEVY.

See JUDGMENTS AND EXECUTIONS. (2 Lansing)

LIBEL.

See HUSBAND AND WIFE. (57 Barb.)

LIEN.

1. An equitable claim on land, which existed prior to the recovery of a judgment, is given a preference over judgments docketed afterwards; but in no case is that preference given where the equitable right did not exist prior to the recovery of the judgment. (*Cook* agt. *Kraft*, ante, 279.)

2. There is no principle of equity by which a purchaser of real estate or of a lease, which, at the time of the purchase is subject to the lien of a judgment, (as in this case) can claim improvements subsequently made by him, although without knowledge of the judgment to be exempt from the lien. (*Id.*)

See VESSELS. (43 N. Y.)

MECHANICS' LIEN LAW. (57 Barb.)

3. A judgment creditor, who advances his money upon the faith of an unincumbered title upon the record, without notice, is entitled to the lien acquired thereby, in preference to the secret, unrecorded lien of the vendor, for a part of the purchase money. (*Hulett* agt. *Whipple*, 58 Barb., 224.)

4. Such a judgment creditor is to be regarded as a quasi purchaser for a valuable consideration, without notice. (*Id.*)

5. The plaintiff, being the owner in fee of land, conveyed the same to C. by warranty deed, taking the promissory notes of the latter for a portion of the

purchase money, payable at different times. At the time of taking such conveyance and executing the notes, C. promised the plaintiff orally, that he would give him security therefor by bond and mortgage, or would give him security on the land. But no further or other security than the said notes was ever given. Subsequently, the defendants, without notice of any lien of the plaintiff for the purchase money, advanced their money to C. upon the faith and credit of the land and the apparent unincumbered record title thereto in him. The deed to C. was drawn by the plaintiff himself, who did not prepare any mortgage to be given, nor require or demand a mortgage as security. The plaintiff waited two years and nine months without making this equitable claim known to others, or making any demand for its enforcement; he received the amount due upon one of the notes, at maturity; and did not then demand a mortgage, nor did he ever make a demand for it, until he brought this action:

Held, that the conduct of the plaintiff amounted to a legal waiver of his right to an equitable lien upon the premises, for the purchase money, as against the lien of the defendants under their judgment. (*Id.*)

6. The mechanics lien law of 1814 (chap. 305, p. 451), made no provision for liens in favor of those performing labor, or furnishing materials for sub-contractors. (*Cheney* agt. *Wolf*, 2 Lansing, 188.)

7. The act of 1854 (chap. 402, p. 1086, extended in 1858, chap. 204, p. 324, to all the cities and counties in the state, except New York and Erie counties), provided for such liens, but required the notice of claim to be filed in the office of a town clerk, a requirement which could not be complied with except in the towns. (*Id.*)

8. Where, therefore, materials had been furnished upon property in Rochester for a sub-contractor, and the notice filed and claim docketed in the county clerk's office of Monroe county, after the act of 1854, but prior to that of 1869, (chap. 585 p. 1355), it was held that no lien had been obtained.

Quære. Whether the laws of 1854 (chap. 402) and 1858 (chap. 204), did not completely repeal the act of 1844. (*Id.*)

LIFE INSURANCE.

1. There can be no estoppel in pais in behalf of one having full knowledge

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of all the facts. And this principle extends to the case of the party's agent having such knowledge when negotiating the contract out of which the estoppel is claimed to arise. (*Baker* agt. *Union Mutual Life Ins., Co.* 43 N. Y., 283.)

2. An acknowledgment on a policy of life insurance of so much money received in cash, is between the immediate parties to the contract, but an admission, and liable to be contradicted. (*Id.*)

3. And where the husband procures a policy of insurance on his own life, but payable to his wife, and the contract is on its face with her as the "assured," if she adopts such policy and sues upon it, her claim must be subject to such stipulations and conditions as were made by the husband on entering into the contract for her. (*Id.*)

4. Accordingly, where notes are given by him as a substitute for a cash payment on a policy of insurance, which notes contain a provision, that, if not paid at maturity, the policy shall become void, they must be paid when due, or the policy will be forfeited. (*Id.*)

5. And this is so, notwithstanding it is made payable to the wife, and acknowledges the receipt in cash of the amount for which the notes were given, and it appears that the wife had no knowledge of the notes or their condition. (*Id.*)

See POLICY OF INSURANCE. (2 *Lansing*.)

LIMITATIONS STATUTE OF.

See STATUTE OF LIMITATIONS. (43 N. Y.)

CORPORATIONS. (57 *Barb.*)

1. The maker of a promissory note, over due, who owed the plaintiff, the indorsee, and holder thereof, several distinct debts, paid him a gross sum, and took a receipt which appropriated the payment in part, to interest due on the note, and recited that the sum so appropriated had been received from and paid by B, who was an accommodation indorser of the note without consideration, per hand of S (the maker). The money had, in fact, been paid without B's authority or knowledge, but the plaintiff showed him the receipt and he thereupon examined it, and expressed his approval.

Held, that the payment took the case out of the statute of limitations as to

such indorser. (*Huntington* agt. *Ballou*, 2 *Lansing*, 120.)

See PLEADING. (*Id.*)

LIMITED PARTNERSHIP.

See SPECIAL PARTNERSHIP. (43 N. Y.)

LITERARY CORPORATIONS.

1. An academy incorporated for the promotion of literature, and authorized to educate males and females, may establish separate departments for each, and, under the general acts of 1840 and 1841, take and hold real estate in trust, to be used for the benefit of either department. (*Adams* agt. *Perry*, 43 N. Y., 487.)

2. Nor is a devise to the academy for such purpose void because it provides that the tuition of daughters of deceased officers, &c., who attend the academy shall be free. This does not constitute a trust in favor of such officers' daughters, or render them the beneficiaries, but if they attend they receive their tuition free, and if they do not, the academy still takes the property for its own use. (*Id.*)

3. The only power in educational corporations to hold property in perpetuity in trust, is by virtue of their charters, and the acts of 1810 and 1811. (*Id.*)

See PERPETUITIES. (*Id.*)

LITTLE VALLEY.

See POWER AND AUTHORITY. (2 *Lansing*.)

LOCAL ACT.

1. A clause in the general act of the legislature "making appropriations for certain expenses of government, and for supplying deficiencies in former appropriations," appropriating from the state treasury, the sum of \$10,000 for the construction of a bridge over the Cattaraugus creek at a particular locality, under the direction of certain commissioners named, further provided, that the supervisors of the counties of Erie and Chautauqua should assess upon their respective counties a moiety of such further sum, not exceeding \$10,000, as the said commissioners should certify to be necessary for the completion of the bridge:

Held, that the latter provision was unconstitutional and void. As to this pro-

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vision, the bill is a "local" bill, and the subject of it is not expressed in the title. It is also in conflict with the constitution in that the title embraces more than one subject, which renders the private or local provisions embraced therein invalid. (*People agt. Supervisors of Chautauque County*, 43 N. Y., 10.)

2. An act is "local" within the meaning of the constitution which in its subject, relates but to a portion of the people of the state or to their property, and may not, either in its subject, operation, or immediate and necessary results affect the people of the state or their property in general. (*Id.*)

M.

MALICIOUS PROSECUTION.

1. If the plaintiff, in an action for malicious prosecution, fails in the proof of either of the following particulars, viz., that the suits instituted against him by the defendant were instituted without probable cause and from malicious motives, and with malicious intent—he is not entitled to a verdict. (*Shafer agt. Loucks*, 58 Barb., 425.)
2. In such an action it is not erroneous for the judge, in his charge, to present the two theories of the case held by the plaintiff and defendant, to the jury, and to leave it to them to say whether an offensive charge contained in the complaint in a former action brought by the defendant, was inserted in the honest belief that it was necessary to sustain the action, or merely as a cover to a malicious purpose of destroying the plaintiff's character; where it appears that the offensive charge was not the cause of action, but an incidental act, stated by way of aggravation, to increase the amount of the recovery. (*Id.*)
3. Nor is it error for the judge to refuse to charge that "if the jury, from the evidence before them, believed that the defendant believed he had a cause of action against the present plaintiff, no matter how small the recovery might have been, it was a legal right to bring the action therefor, and it was no matter how much malice might have inspired the defendant; the plaintiff could not recover." (*Id.*)
4. Good faith, merely, is not sufficient to protect the defendant from liability, in an action for malicious prosecution. There must be reasonable ground for

suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the plaintiff was guilty, to make out such a probable cause as will be a defense. (*Id.*)

5. Belief, and reasonable grounds for belief, are both essential elements in the justification of probable cause. A man is responsible if he fails to call into his aid reason, caution and fairness. He must not act upon mere conjecture, or impulse or passion. (*Id.*)

MANDAMUS.

1. An alternative writ of mandamus should be a statement of the relator's title to the relief demanded, and should contain no allegations except such as are pertinent to that title and relief. (*People agt. Ovenshire*, ante, 164.)
2. The alternative mandamus stands as a declaration or complaint, and sets forth the relator's title to the relief; in other words, his cause of action. The further proceedings under the statute are precisely like those in an ordinary action. (*Id.*)
3. It is certainly an unknown practice since bills of discovery have been abolished, for the plaintiff to apply that the defendant make a further answer to the allegations of the complaint; and there is no reason for any difference in this respect between an action commenced by mandamus and one commenced by an ordinary complaint. (*Id.*)
4. There seems to be no reason why the relator should seek a further return in a case like the present—where the defendant undertakes to set up new matter as a defense, but fails to do it with sufficient certainty, whatever may be proper in a case like that reported in (*9 Wendell*, 429.) (*Id.*)
5. A motion by the relator to compel the defendant to make a further return is an anomalous proceeding. And it seems that the case in *9 Wendell*, (*supra*), should not be considered as authority beyond the facts contained in that particular case. (*Id.*)
6. Where by an act of the legislature authorizing a town to issue its bonds to aid in the construction of a railroad, it is declared that such power shall not be exercised until the consent in writing of a majority of the taxpayers owning more than one half the taxable property shall be obtained, and it is provided that the proof of such con-

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sent shall be by the affidavit of the assessors of the town, and it is made the duty of the assessors to make such affidavit whenever the requisite consent shall be obtained.

Held, the assessors having refused, that however clearly it was made to appear to the court that the requisite consents had actually been obtained, a mandamus will not be granted against the assessors to compel them to make such affidavit. In such case the court has power to compel the assessors by mandamus to proceed and examine the evidence, and determine the fact, and if, from their determination, it appears that the requisite consent has been given, to make affidavit in accordance therewith, but will not compel them to determine in any specified way, and make affidavit according to such enforced determination. (*Howland agt. Eldridge*, 43 N. Y., 4.)

See BOUNTY TO VOLUNTEERS. (*Id.*)
STREETS. (*Id.*)

Where the real estate connected with an asylum belonged to the State, upon which property there was a mortgage for \$60,000 about to fall due, and no funds applicable to the payment of it, except the funds in the hands of the treasurer; and the legislature passed an act requiring the commissioners of the land office to examine into the management of the asylum by the superintendent and other officers of the institution, and take such action (if any) to protect the interest and property of the State, in said asylum, as they might deem necessary: *Held*, 1. That the facts were sufficient to justify the commissioners in causing the funds of the corporation to be secured and placed in the custody of a person selected by themselves. 2. That the power vested in the commissioners was quasi judicial, and wholly discretionary. 3. That such a discretion, except in a case of palpable abuse, was beyond judicial control by the writ of *mandamus*. 4. That the only conceivable limit on the power vested in the commissioners was that their action should be reasonable, and adapted to the object the legislature intended, viz., the protection of the interest and property of the State. 5. That the action of the commissioners, in assuming the control of the funds of the corporation, and of its books, papers and vouchers, and in directing the treasurer to hold them subject to their control and direction, was unobjectionable, and was a good defense to an application for a *mandamus*, commanding such treasurer to

pay over the moneys, and to deliver the books and papers, in his possession, to his successor in office. *The People ex rel. The New York Inebriate Asylum agt. Osborn*, 57 Barb., 663.)

7. The relator, on the 30th of July, 1863, enlisted into the military service of the United States as a volunteer, and was credited to the town of L., under the call made by the President of the United States on the 14th day of April, 1864. On the 13th day of August, 1864, the electors of the town of L. at a special town meeting, by resolution, authorized the supervisor, town clerk and one of the justices to issue certificates of indebtedness to the amount of \$300, as bounty to each and every volunteer who had been or might be thereafter credited to said town; provided he should have enlisted or re-enlisted between the 13th day of July, 1863, and the 1st day of January, 1864, and had received no bounty from said town; upon the production of the proper evidence that the volunteer had been credited to said town of L. *Held*, that when a volunteer bringing himself within the provisions of the resolution of the special town meeting, presented proper evidence of the facts to the town officers, it was their duty to issue to him a certificate of indebtedness for \$300; and that upon their refusal to do so, a *mandamus* was the proper remedy. *PARKER J.* dissented. (*The People ex rel. Vanderlind n. agt. Martin*, 58 Barb., 286.)
8. *Held, also*, that the objections to the issuing of such a process—that the relator was a non-resident of the United States, and owed no allegiance to them; that he first enlisted to the credit of another town, and was transferred to the town of L. without his own knowledge or consent—were all technical and without force. (*Id.*)
9. *Held, further*, that if the town officers had not met, no other demand of performance could be made than a several demand; and if it was necessary for the officers to meet, to perform their duty, then a demand that they issue a certificate was, of itself, a demand that they should meet for that purpose. (*Id.*)
9. By an act of the legislature, land was set apart "as a parade ground for the county of Kings," and declared to be a "public place." Provision was made for acquiring the title thereto by the Commissioners of Prospect Park in the city of Brooklyn, and for assessing the damages of the owners; and it was declared that the lands, when taken,

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should be the property of said county, "as and for a parade ground," but should be under the exclusive charge and management of such commissioners "for the purposes of police and improvement as such parade ground." *Held*, 1. That it was the intention of the statute that the grounds should be acquired, not merely for a public place and parade for the use of Kings county, but for the general purpose of military parades. 2. That the provision of the statute placing the land under the exclusive charge and management of the commissioners of Prospect Park, "for the purposes of police and improvement as such parade ground," so far restricted the general sense and meaning of the terms "public place" and "parade ground," as to render the public use of the ground as a parade ground subject to the police regulations which might be properly adopted by the commissioners. 3. That within the lawful exercise of that authority, the commissioners might exclude from the ground such military organizations as in their judgment could not be safely entrusted with its use and enjoyment. 4. That under the authority to establish rules and regulations for police and improvement, the commissioners were invested with a sound discretion as to the military organizations which could be safely and judiciously intrusted with the use of the grounds; leaving them at liberty, in the discreet exercise of their powers, to admit such as would properly use, without abusing, the grounds, and to exclude from them such as they might believe could not be safely or prudently admitted to the enjoyment and use of them, without endangering their condition, or disturbing the good order and security of the neighboring inhabitants. 5. That if this discretion should be improperly made use of, or be perversely abused, the remedy for its correction was not by means of the writ of *mandamus*, but by direct measures for the removal of the commissioners, or for punishing them, in case they should intentionally and wilfully omit to discharge the duties imposed upon them by law. (*The People ex rel. The Board of Supervisors of Kings County agt. The Commissioners of Prospect Park*, 638 *Barb.*)

MAPS.

See EVIDENCE. (57 *Barb.*)

MARITIME CONTRACT.

See ADMIRALTY JURISDICTION. (43 *N. Y.*)

VESSELS. (*Id.*)

MARKET VALUE.

See EVIDENCE. (2 *Lansing*.)

MARRIAGE.

1. A valid marriage, to all intents and purposes, is established by proof of an actual contract, *per verba de presenti*, between persons capable of contracting, to take each other for husband and wife; especially where the contract is followed by cohabitation. (*Van Tuyl agt. Van Tuyl*, 57 *Barb.*, 235.)
2. No solemnization or other formality, apart from the agreement itself, is necessary. (*Id.*)
3. Nor is it essential to the validity of the contract, that it should be made before a witness. (*Id.*)
4. Yet a contract, *per verba de presenti*, constitutes marriage only when the parties intend that it shall do so without any subsequent ceremony. A proposition to cohabit as man and wife, with an assurance of a future marriage, would be a nullity. (*Id.*)

MARRIED WOMEN.

1. As the law undoubtedly now is, in regard to the separate property of married women, they may make *special contracts with their husbands*, and let jobs to them of particular work, such as building and the like, the same as though they were strangers, and in such a case, where the transaction is, in all respects, in good faith, and the husband employs the men on his work in his own name and for his own benefit as contractor or jobber, and in no respect on the wife's credit, the laborers so employed would have to look to the husband for pay, and could not make the wife liable, the same as in any other case where a jobber employs laborers for himself to work on his job. Such an arrangement between husband and wife, however, should be regarded with suspicion; and, in case of non-payment of the laborers by the husband, the most searching and rigorous scrutiny should be instituted. (*Fairbanks agt. Mothersell*, ante, 274.)
2. In this case the defendant owned separate real estate, and was engaged in building upon it. She let the job of digging the cellar and laying the cellar wall to her husband, and paid him therefor, according to the agreement,

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- \$138. The husband requested the plaintiff to do some work, with his team, of plowing and scraping in leveling off the lot, and the plaintiff did not know at the time but that the husband owned the premises, and supposed he was working for him upon his own property. (*Id.*)
3. In an action against the wife to recover the amount of this work, labor and services, *held*, that this work was not done upon the cellar job let to the husband, but upon the lot belonging to the wife; so the case stands simply upon an employment by the husband to work for his wife on her separate property, without any express agreement whether he should be paid by the husband or wife. The defendant knew the plaintiff was at work there, and saw the kind of work he was doing, and the law will imply a promise, on her part, to pay for the services, if it was in fact her work. Judgment for plaintiff. (*Id.*)
4. An action at law, seeking an ordinary pecuniary judgment, as upon a personal contract, is not maintainable against a married woman who, without consideration and without benefit to her separate estate, and simply as the surety of her husband and for his accommodation, indorses his note. (*The Corn Exchange Insurance Co. agt. Babcock, 57 Barb., 222.*)
5. In order to create a valid charge upon the separate estate of a married woman, there must be a specific description of the property, in the instrument creating it, executed according to legal formalities, and enforced in equity, under a complaint seeking as relief, not a general judgment, but the satisfaction of the charge out of the specific property subjected thereto. (*Id.*)
6. Such a charge cannot be created by a married woman's accommodation indorsement of a promissory note, in these words: "For value received I hereby charge my individual property with the payment of this note;" where the attempted charge is not founded upon any benefit to her separate estate, or upon any matter in which she has an interest, or on account of which she has received any consideration. (*Id.*)
7. Section 3 of the act of 1862, chap. 172, empowering a married woman, possessed of real estate as her separate property, to bargain, sell and convey the same, and to enter into any contract in reference thereto, refers to such modes and forms of bargain and sale and conveyance of real estate, and contracts relative thereto, as were recognized as legal and were in conformity with the law existing at the time, and does not sanction a charge or contract of the kind above mentioned. (*Id.*)
8. Section 7 of that act, authorizing a married woman to sue or be sued in all matters having relation to her sole and separate property, in the same manner as if she were sole, refers mainly to her right and liability to sue and be sued without having her husband joined with her, and was not intended to subvert the rules of law or legal proceeding then existing in regard to the essential characteristics of such actions, or the kind of relief to be sought, or the mode in which it is to be reached. (*Id.*)
- See HUSBAND AND WIFE. (Id.)*
9. A married woman is liable for the fraud of her husband acting for her, as her agent, in the purchase of real estate, although she was wholly ignorant of the fraud practised, and did not authorize it; where she had the fruits of the bargain, kept the property bargained for, and sold it, and retains the proceeds. (*Graves agt. Spier, 58 Barb., 349.*)
10. She will be held under such circumstances, to have made the instrumentalities, by which the property was procured, her own. And the law will impute the wrong to her, as it was done for her benefit and she retains the advantage. (*Id.*)
11. Where a married woman, since the acts of the legislature of 1860 and 1862, concerning the rights and obligations of married women were enacted, being possessed of real estate as her separate property, bargains and sells the same, and joins with her husband in a deed thereof, which contains covenants of seisin, of warranty, and against incumbrances, such covenants are binding and obligatory upon her, so far as to render her separate property liable for their non-performance. (*Sigs agt. Johns, 58 Barb., 620.*)
12. And an action will lie against her, to recover damages for a breach of the covenant against incumbrances, in the same manner as if she were sole; the object of such action being to satisfy the plaintiff's demand, out of her separate estate. (*Id.*)
13. The statute, neither by its language, nor its fair import, requires the complaint, in such an action to show that

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the defendant has separate property. (*Id.*)

14. The effect of the act of 1860 is that, in the actions provided for, the defendant may, though married, be sued and prosecuted precisely as if she were a single woman. (*Id.*)
15. But this construction does not extend the section prescribing the obligation by means of the covenant beyond its ordinary and natural import; for it can in no possible event render the liability greater than that declared by the statute; as nothing more than the defendant's separate property can be taken for the purpose of satisfying the judgment. (*Id.*)

See HUSBAND AND WIFE. (58 *Barb.*)

See JOINT AND SEVERAL DEBTORS. (2 *Lansing.*)

MASTER AND SERVANT.

1. A master is not liable for the malicious and wilful act of his servant, done without his direction or assent, although while in his employment. (*Fraser* agt. *Freeman*, 43 *N. Y.*, 566.)
2. Where the plaintiff's intestate was shot and killed by M., while in the employment of the defendant, and while the defendant, together with M. and another servant, were endeavoring under claim of right, to enter upon the premises of the intestate, and there was no evidence that the fatal shot was fired by the express direction or assent of the defendant:

Held, in a civil action brought by the plaintiff under the statute to recover damages from the defendant for causing the death of their intestate, it was erroneous for the court to refuse to charge the jury, that if they believed that M. fired the shot with the premeditated design to effect death, the defendant was not liable for the act. (*Id.*)

3. The plaintiff's intestate employed by the defendant as a carpenter, was directed by the foreman of the gang to go, for the purpose of his labor, on a scaffolding erected in one of the defendant's shops, and which was apparently safe and properly constructed; but was in fact unsafe and dangerous, and had been constructed by unskilful and wholly incompetent persons, and of poor and insufficient material; and on the plaintiff's intestate stepping thereon it gave way, causing injuries which resulted in his death.

Held, that in the absence of proof, by whom the persons constructing the scaffolding has been selected, or under whose directions it had been constructed, the presumption was that such persons had been selected by, and the scaffolding erected under the direction of the defendant; that on the foregoing facts appearing in evidence, the burden was on defendant to show that competent persons had been selected, or the scaffolding constructed in a proper manner; and that it was error to nonsuit the plaintiff, on the ground that the injury to the deceased was caused by the negligence of a fellow servant, or that no knowledge of any incompetency of the defendant's servants, or of any defectiveness of the scaffold had been brought home to the defendant, or that the persons guilty of the negligence causing the injury, had not been employed by the defendant but by a competent agent of the defendant. (*Brickner* agt. *N. Y. C. & R. R. Co.*, 2 *Lansing*, 506.)

MECHANICS' LIEN.

1. Under the mechanic's lien laws, (*Laws* 1851, and 1863,) of the city of New York, where the owner makes a voluntary payment in good faith to the contractor, before the lien of a sub-contractor is filed, it is a good payment as against the sub-contractor, although by the terms of the contract the amount was not then due the sub-contractor and did not become due until after the time when the lien notice was filed. (*Schneider* agt. *Hobain*, ante, 232.)
2. But no voluntary payment made by the owner to the contractor after the sub-contractor, or workman, has filed his notice to lien, can in any wise affect or impair the lien of the latter. (*Id.*)
3. The effect of the ceasing of the lien for want of an order renewing it, under § 10 of the *Mechanic's Lien Law*, (*ch.* 500, *Laws*, 1863,) is to destroy all recourse of the lienor to the particular property described in the lien. The proceeding to foreclose, so far as the owner of the property is concerned (if he be not personally liable to the lienor for the debt) it is at an end, and the proceeding should be dismissed as to him. (*Schachtler* agt. *Gardiner*, ante, 243.)
4. But as between the lienor and the contractor, who, is personally liable to him, the ceasing of the lien does not

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- affect the proceedings, if the issue joined and the judgment claimed by the lienor depend, not upon the lien, but the merits of the claim upon which it was founded, if the court have jurisdiction of the proceeding. (*Id.*)
5. Where the court acquires, under the act, full jurisdiction of the parties and of the controversy between them, before the lien ceases, the judgment rendered is regular. (*Id.*)
6. And where such judgment is against the lienor, it would not be fair to permit him on motion, to avoid the effect of it on the merits, after a full and protracted trial, in a tribunal of his own choosing. (*Id.*)
7. It would seem to be proper to dismiss the proceedings as to the owner, after the lien has been removed by the deposit of the amount of the lien with the county clerk, by the contractor under the act; the lienor then having no rights against the owner but is left to the funds in the clerk's hands for the satisfaction of his lien. (*Id.*)
8. Rule 32 (old) does not apply to a reference "of the issues" in a lien proceeding, and the exceptions are not to be heard first at special term. (*Id.*)
- See VESSELS. (43 N. Y.)
9. Proceedings to foreclose a lien, under the mechanics' lien law, are purely *in rem*, founded on statute, and cannot be used for any other purpose than such as the statute contemplates. (*Grant* agt. *Vandercook*, 57 Barb., 165.)
10. Such proceedings operate only as a foreclosure of the lien, and not as an action for the collection of a debt. (*Id.*)
11. The judgment in these proceedings is designed to enforce the lien; and unless one is recovered and docketed during the life of the lien, i. e., within one year from the time of the creation of the lien—none can be recovered afterwards. (*Id.*)
12. A judgment recovered after the expiration of the year is unauthorized and void, and will be vacated on motion. (*Id.*)
13. If the lien has expired or failed, no judgment whatever can be rendered for the claimant. He cannot convert his proceedings into an action for the recovery of money upon a personal contract, and insist upon the defendant's personal liability. (*Id.*)
14. Section 2 of the mechanics' lien law, (*Laws* of 1854, ch. 402,) gives a lien against the owner, to the extent of his interest, upon a house, and upon the land on which it stands, for labor done upon, and materials furnished for, such buildings, upon compliance with the provisions of that act. (*Copley* agt. *O'Neil*, 57 Barb., 299.)
15. Unless the person proceeded against is owner, there can be no lien; and if there is no lien there can be no judgment, under the act. (*Id.*)
16. Thus, where the defendant, who was guardian of his infant daughter, erected a house upon land owned by her:
- Held*, that he could not, as such guardian, without authority from a competent court, build a house upon the land of his ward, and charge the expense upon the ward, or create a lien upon the property for labor and materials, in favor of the mechanics employed. (*Id.*)
- See GUARDIAN AND WARD. (*Id.*)
LIEN. (2 Lansing.)
- MISTAKE.
- See ESTOPPEL. (57 Barb.)
JUSTICE OF THE PEACE. (*Id.*)
- MISTAKE OF FACT.
1. The defendants being indebted to the plaintiff for goods sold, gave him the promissory note of a third person, which was received by him in full payment and discharge of the debt. The maker of the note was insolvent at the time of the transfer of the note, though this fact was unknown to the parties:
- Held*, that it was a case of mutual mistake of fact, and that the plaintiff was entitled to recover from the defendants his original debt. (*Roberts* agt. *Fisher*, 43 N. Y., 159.)
2. In an action for money paid under mutual mistake of facts, it is no defense that the mistake arose from a want of care on the part of the plaintiff. (*Union National Bank of Troy* agt. *Sixth National Bank of N. Y.*, 43 N. Y., 452.)
3. Where the plaintiff, a bank at Troy, being the correspondent of the defendant, a bank in New York, received from it a note for collection from a maker residing some thirty miles from Troy, and sent the note to his corresponding bank at the residence of the maker, and the note, not having been paid at maturity, such corresponding bank caused it to be protested, and notices of protest to be duly sent to the indorsers in New York, and also mailed

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both to the plaintiff and the defendant; but the plaintiff, by some miscarriage, failing to receive such notice, and supposing, therefore, that the note had been paid to its correspondent, remitted a sum equal to its amount to the defendant as collected:

Held, that the plaintiff may recover of the defendant the sum so remitted as money paid under a mistake of fact:

Held, further, that the mere fact that the defendant, on receiving notice of protest, had received from an indorser of the note its amount, and on receiving the money from the plaintiff, and, in consequence thereof, supposing the note had been paid by the maker, refunded the amount to such indorser, raised no defense to the action, *in the absence of any proof that the indorser was not still liable and responsible to the defendant.* (*Id.*)

4. Though the plaintiff is to be considered the agent of the defendant for the collection of the note, the mistake did not arise from any negligent performance of its duty as such agent, and in such case, the relation of principal and agent between the parties does not change the rule. (*Id.*)

5. The plaintiff applied to the defendant to purchase a ton of hay; the defendant offered to sell him a quantity by measurement, giving him to understand that its dimensions would include a ton. The plaintiff took the quantity, and paid for a ton, but there was in fact much less than that in weight. In an action for the excess in price,

Held, that in the absence of fraud, there was a mutual mistake, in a material fact, and the plaintiff could recover. (*Scott* agt. *Warner*, 2 *Lansing*, 49.)

MILITARY BOUNTIES.

See MANDAMUS. (58 *Barb.*)

MILLS.

See WATER. (58 *Barb.*)

MONEY PAID

See VENDOR AND VENDEE. (43 *N. Y.*)

1. Money was paid by the plaintiff's assignors to S., in order that such assignors might become members of an association of which S. was president; but there was no evidence, or finding, that

they ever did become such members. Subsequently the association was dissolved. *Held*, that the money having been paid for an object that was never accomplished, and which it had become impossible to accomplish, S., or his administrator, was bound to refund the same. (*Churchill* agt. *Stone*, 58 *Barb.*, 233.)

MONEY HAD AND RECEIVED.

See PARTNERSHIP. (57 *Barb.*)

1. Upon a sale without writing, of standing grass, the vendee paid the whole price, entered, cut, and removed a portion of the crop, when he was stopped by the vendor.

Held, that the vendee was not entitled to recover the sum paid without allowance for the grass taken. (*Watkins* agt. *Rush*, 2 *Lansing*, 234.)

2. The complaint claimed damages for non-delivery of the grass, the answer was a general denial and plea of the statute of frauds.

Held, that evidence of the quantity of grass removed was competent upon the question of damages. (*Id.*)

MORTGAGE.

See FIRE INSURANCE. (43 *N. Y.*)
FORECLOSURE. (*Id.*)
RAILWAYS. (*Id.*)

MORTGAGE FORECLOSURE.

1. Where an action is commenced and at issue, to foreclose a third mortgage on premises, the mortgagor cannot, on motion, stay the mortgagee's proceedings, on the ground that a judgment of foreclosure on the first mortgage (which last action of foreclosure was commenced simultaneously with the other action), made it necessary for the mortgagee in the third mortgage to seek his remedy against the surplus moneys on the first mortgage. The third mortgagee had a right to have the issue in the action tried. (*Daily* agt. *Kingon*, ante, 22.)

2. The neglect to serve on infant defendants in a mortgage foreclosure case, copies of an amended complaint is a great irregularity. But where too much time has elapsed, and too many innocent parties are interested, the judgment will not be disturbed on that ground. (*McMurray* agt. *McMurray*, ante, 41.)

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3. The want of appointment of a *guardian ad litem* for infant defendants in such a case renders the judgment of foreclosure, *erroneous*, and it may be set aside on motion as a matter of right. (*Id.*)

4. But where the infant defendants could severally have moved to set aside the judgment as they came of age, but delayed respectively about nine, seven and four years, *held*, that innocent parties ought not to suffer by the delay. Motion denied, without prejudice to the right of the moving parties to bring an action of ejectment, or by an action to redeem the order to test their claim to set aside the judgment of foreclosure as being absolutely void. (*Id.*)

5. A county court has jurisdiction of an action to foreclose a mortgage, which contains, in addition to the premises described and situated in its own county, lands described and situated in another county. (*Strong* agt. *Eighme*, ante, 117.)

MORTGAGE OF CHATTELS.

1. A mortgagee of chattels cannot obtain a lien upon other similar chattels, as against a subsequent purchaser thereof, through a verbal agreement between himself and his mortgagor to consider them substituted in the place of those described in the mortgage. (*Powers* agt. *Freeman*, 2 *Lansing*, 127.)

2. And to protect himself against a subsequent purchaser of the mortgaged property, he must pursue the statute respecting the filing of his mortgage literally. (*Id.*)

3. Thus, where the mortgagor resided in the town of Antwerp, Jefferson county, and bought a farm and stock thereon, in the town of Wilna in that county, and gave a mortgage on the stock, and a few days after moved his residence to the farm, and the mortgage was filed in the latter town.

Held, that it was void as against a subsequent *bona fide* purchaser. (*Id.*)

See **BILLS OF EXCHANGE AND PROMISSORY NOTES.** (*Id.*)
JUDGMENT AND EXECUTORS. (*Id.*)

MORTGAGE OF LAND.

1. B was indebted to a bank, and executed to it his bond for an amount equal to part of the indebtedness, conditioned to pay

at a time specified; he then joined with his wife in a mortgage of her separate real property, securing to the bank the payment of the sum named in the condition of the bond, according to the terms thereof, and delivered it, agreeing that it should remain a continuing security in the hands of the mortgagee for payment of all his liabilities then existing,—something more than double the amount secured,—and also for all those he might afterward incur. The bank had no actual notice that B was not owner of the mortgaged property, but the deed to B's wife was recorded. B never paid his original indebtedness. He obtained extensions of the time of payment after the maturity of the liability secured by the mortgage, and became still more largely indebted to the bank, and so remained at the time of his decease. In an action by the bank to foreclose the mortgage.

Held, that it was originally a valid collateral security for payment of the existing indebtedness covered by B's bond. (*Bank of Albion* agt. *Burns*, 2 *Lansing*, 52.)

2. That it was not a continuing guaranty for future advances to B, he having no presumptive authority from his wife, to make an agreement in that respect. (*Id.*)

3. That the plaintiff was charged with notice that the owner of the land pledged, it as surety for B's debt. (*Id.*)

4. That the land was discharged from the lien of the mortgage by the indulgence given to the principal debtor. (*Id.*)

5. W owned and mortgaged certain premises to T by several mortgages, then conveyed by deed, intended as a mortgage to C, and then in consideration of all the debts so charged upon the premises, (that upon the conditional deed being paid by T), conveyed the same to T, and at the same time obtained a conveyance thereof to him from C, whereupon T gave C for the benefit of W, an offer in writing to resell before a specified time, at a sum equal to the consideration of the conveyances to C, and mutual releases under seal were exchanged between T and W. In an action by W to redeem from T after the expiration of the time, named in the offer, it appearing that the conveyances to T were intended to satisfy and extinguish the mortgage debts to him of W.

Held, that such conveyances were not merely mortgages, but absolute deeds. (*Whitney* agt. *Townsend*, 2 *Lansing*, 249.)

See ASSIGNMENT OF MORTGAGE. (*Id.*)
 COMMON CARRIER. (*Id.*)
 GUARDIAN AND WARD. (*Id.*)
 LANDLORD AND TENANT. (*Id.*)
 STATUTE FORECLOSURE OF A MORT-
 GAGE. (*Id.*)
 USURY. (*Id.*)

MOTIONS.

See PRACTICE. (2 *Lansing*)

MUNICIPAL CORPORATIONS.

1. *Swift* agt. *City of Poughkeepsie*. (37 *N. N.* 511.) approved. (*Bank of Commonwealth* agt. *Mayor of N. Y.* (43 *N. Y.*, 181))
2. *It seems* that municipal corporations are not liable for acts of *misfeasance* of public officers not appointed by them, though performing certain acts for them under the law by which they are appointed. (*Id.*)

See STREETS. (*Id.*)

3. A municipal corporation has no authority, under the act of the legislature of May 18, 1869, (*Laws of 1869, ch. 906*), to issue its bonds for the purpose of aiding a railroad corporation in constructing a railroad, where such railroad company has no authority, under its articles of association or otherwise, to construct a railroad, or any part of it, in the county in which such municipal corporation is situated. (*The People ex rel. Averill* agt. *The Adirondack Company*, 57 *Barb.*, 656.)
4. There must be a corporation capable of receiving the aid, in the manner offered, as well as a corporation to bestow the aid. (*Id.*)
3. An order of a county judge, appointing commissioners under the act of the legislature of 1869, chapter 907, based upon a petition of tax-payers which is conditional and not absolute, being conditioned that the avails of the bonds to be issued by a city in aid of a railroad company shall be used exclusively in the construction of a railroad within a particular county—a county in which the railroad company has no right to construct a road—is void. (*Id.*)

See ADIRONDACK COMPANY. (*Id.*)

MUTUAL INSURANCE.

See PREMIUM NOTE. (2 *Lansing*.)

N.

NATIONAL BANKS.

1. The statutes of the State of New York against usury do not apply to loans made by national banks organized under the act of congress, passed June 3, 1864, entitled an act to provide a national currency. &c. (*First National Bank of Whitehall* agt. *Lamb*, 57 *Barb.*, 429.)
2. In regard to the express provisions of that act, the federal government has exercised its sovereign power over the law of these institutions; and to that extent its power, and its enactment are exclusive. The State law penalties have no application to the system. (*Id.*)
3. Although the statute has subjected national banks organized under its provisions to the judicatories of the State, so that as to the form of the action and the proceeding in its courts, the State system of practice is, and must be adopted; the federal government not having in that particular expressly asserted its own power; yet in whatever court the action may be pending, the law prescribed in the express provisions of the act of congress is sovereign and exclusive. (*Id.*)

NEGLIGENCE.

1. Where a steamboat collides with a vessel aground in or near the channel of a navigable river, it will not relieve the colliding vessel from liability for the injury, that from some hidden and unforeseen cause, her bow was suddenly sheered directly toward the injured vessel, when so near that by the utmost care and vigilance, the collision could not be avoided, when it also appears that at the time the steamboat's bow so sheered, her pilot under an erroneous impression as to the true direction of the channel, was negligently steering her away from it, and out of the accustomed course. (*Austin* agt. *New Jersey Steamboat Co.*, 2 *Lansing*, 76.)
2. A party cannot excuse himself upon the plea of inevitable accident, where, by his own negligence, he has placed himself in a position which renders a collision unavoidable. He must exercise care and foresight to prevent reaching a point from which he is unable to extricate himself; and omitting these the greatest vigilance and skill on his part, subsequently, when the

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- danger arises, will not avail him. (*Id.*)
3. Where it appears that the grounding of the injured vessel was caused by her running out of the accustomed channel (her pilot committing the same mistake as to the proper course that was afterward committed by the pilot of the colliding steamer), the negligence in so running her aground is not that "proximate" negligence contributed to the injury which will prevent a recovery by her owners for damages occasioned by the subsequent negligence of those in charge of the steamer in running into her, when they had knowledge of her position, and that she was aground. (*Id.*)
 4. Notwithstanding the previous negligence of those managing the grounded vessel, if, at the time the injury was committed, it might have been avoided by the defendant, by the exercise of reasonable care and prudence, an action will lie for the injury. (*Id.*)
 5. *Strout* agt. *Foster* (1 *How.*, U. S., 89) commented upon and distinguished. (*Id.*)
 6. It is not negligence in those in charge of a vessel aground to omit to give signals to approaching vessels, as to which side of her is the proper course for them to take, even if such course is known to them. The customary signals from steam vessels by blasts of the steam whistle, are to indicate the course which the vessel giving them intends, herself, to take, and are not therefore appropriate to be given by a steamer not in motion. (*Id.*)
 7. A clause in a bill of lading, given to the shipper of goods by a common carrier, exempting the carrier from liability for loss of the goods from certain causes is binding upon the shipper, as a special contract between the parties. (*Steinway* agt. *Erie Railway*, 43 *N. Y.*, 123)
 8. But where such clause releases the carrier "from damage or loss to any article, from or by fire, or explosion of any kind," it does not release him from liability for damages by those means, resulting from his own negligence. (*Id.*)
 9. It is negligence in a carrier to omit to furnish for its vehicles and machinery for the transportation of goods, any improvement known to practical men, and which has actually been put into practical use; but a failure to take every possible precaution which the highest scientific skill might suggest, or to adopt an untried machine, or mode of construction, is not, of itself, negligence. (*Id.*)
 10. Accordingly, where goods having been shipped upon the defendant's railway, under a bill of lading containing a clause releasing it from liability "for damage or loss to any article from or by fire, or explosion of any kind," were destroyed by fire kindled by sparks from the locomotive hauling them.
- Held*, that such clause did not exempt the defendant from liability for loss by fire occasioned by the omission to apply to the locomotive any apparatus known and actually in use, which would prevent the emission of sparks; but *held* further, that the charge of the judge that, if the jury should find "that a locomotive could be so constructed as to prevent the emission of sparks, and thereby secure combustible matter from ignition, and the defendant neglected so to construct this locomotive, they should find for plaintiff, because there was a duty upon the defendant to use every precaution and adopt all contrivances known to science to protect the goods intrusted to it for transportation," was error and not in accordance with the correct rule. (*Id.*)
- See **BILLS OF EXCHANGE.** (*Id.*)
CONTRIBUTORY NEGLIGENCE. (*Id.*)
AGREEMENT. (57 *Barb.*)
CARRIERS. (*Id.*)
RAILROAD COMPANIES. (*Id.*)
11. In an action to recover damages for personal injuries arising from negligence, the evidence touching the negligence of the parties is for the jury. (*Maloy* agt. *The New York Railroad Company*, 58 *Barb.*, 182.)
 12. Whether it was negligence in the plaintiff to walk upon a sidewalk in a dark night, without a light, is a question of fact for the jury, and not a question of law for the court. (*Id.*)
 13. So, also, as to the treatment of the party injured; it being the duty of the person injured to take proper care thereof, and, if necessary, to employ a competent surgeon, evidence touching the injury, and its treatment, is properly submitted to the jury; and the question of the negligence of the plaintiff in regard to the injury is for the jury. (*Id.*)
 14. The owners of the vessel are not bound to close the hatches at night so as to protect from injury a trespasser, or one who has no right or license to

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be put upon the vessel. (*Baker agt. Byrne*, 58 Barb., 438.)

15. The principle on which owners of the property are liable for acts of negligence in the use thereof, is that they are in duty bound to keep their property in such a condition that persons who are lawfully on the premises shall not be injured; but it does not extend to those who are on the premises of others without right, or without permission. (*Id.*)

16. A pier like any other public place, must be kept in repair: and if it is not and damage ensues, the party whose duty it is to keep it in repair is liable for his negligence. But if persons using such pier know that it is unsafe for use, and with that knowledge use it, and sustain loss, the doctrine that one who contributes to an injury cannot recover damages for such injury, applies. (*Clancy agt. Byrne*, 58 Barb., 449.)

17. Where it appears, in such a case, from the plaintiff's own testimony, that he was aware that the pier was out of repair, and in a dangerous condition, and yet he directed his horse to be driven on to it, the question whether the plaintiff's own negligence contributed to an injury sustained by the horse should be submitted to the jury, with instructions that if it did, the plaintiff cannot recover. (*Id.*)

18. A canal boat captain in charge of the plaintiff's boat, having reason to think, and believing that the gates of a lock were in bad repair and insecure, in the absence of the lock-tender, undertook to take the boat through the lock, as by such case he was authorized to do. He had no notice from the defendant, whose duty it was to keep the lock in safe condition, that it was insecure; boats had been passed through the lock up to the time in question; and it was to be inferred from the evidence, that the captain believed he could pass the boat safely through; the gates gave way, and the boat was injured, and delayed for repairs.

Held, that the plaintiff was entitled to recover damages on account thereof. (*Johnson agt. Belden*, 2 Lansing, 433.)

See COMMON CARRIER. (*Id.*)
MASTER AND SERVANT. (*Id.*)

NEW YORK CITY.

See STATUTE OF LIMITATIONS. (43 N. Y.)

TAXES. (*Id.*)

1. The provision of the act of 1857, to amend the charter of the city of New York, (*Laws of 1857*, ch. 446, § 7,) requiring all resolutions and reports of committees which shall recommend any specific improvement involving the appropriation of public moneys, or the taxing or assessing of the citizens, to be published in all the newspapers employed by the corporation, is to be considered directory; and a departure therefrom through mistake, or even negligence, and not intentionally, will not vitiate the proceedings. (*Matter of Douglass*, 58 Barb., 174.)

2. But the subsequent clause of the same section which directs that such resolutions and reports "shall not be passed or adopted until after such notice has been published at least two days," is prohibitory; and a passage of a resolution or report without a compliance with the condition of such clause, is illegal. (*Id.*)

3. The statute does not require two publications. It is sufficient if two days shall elapse between the publication of the notice and the passage of the resolution. (*Id.*)

4. The adoption of the resolution means its passage by both boards; and it is only necessary that two days, after publication of the notice, shall intervene between the introduction of the resolution and its final passage in both boards of the common council. (*Id.*)

5. The act of the legislature, of April, 1870, making further provision for the government of the city of New York. (*Laws of 1870*, p. 881,) does not apply to cases which had arisen before the passage of such act; but was prospective only, in requiring the amount erroneously to be assessed to be deducted. (*Matter of Eager et al.*, 58 Barb., 557.)

6. It is erroneous to charge upon the owners of lots assessed for laying a Nicolson pavement, the cost of crosswalks directed by the ordinance, but which have not been actually laid. (*Id.*)

7. A charge of two and one-half per cent. for collecting an assessment is not erroneous. The statutes give the percentage on the whole amount assessed and collected. (*Id.*)

8. A contract for laying a pavement should not include an allowance to be paid to the contractor for extra compensation in case the work shall be

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completed before the time fixed by the contract. (*Id.*)

NON-IMPRISONMENT ACT.

1. The affidavit presented to a justice of the peace under the act to abolish imprisonment for debt (1831, ch. 300, § 33), as the basis for a short attachment, need not state facts showing any fraudulent or improper act, as required in the affidavit on application for a long attachment. (*Stevens* agt. *Benton*, 2 *Lansing*, 156.)
2. But, *quere*, whether an objection that the affidavit does not state the facts which show that the claim is on contract, and which render a warrant impossible under section 30, is not available to the defendant. (*Id.*)
4. When it appears on the return of an attachment, issued under section 33, that property has been attached, but that copy of the inventory and attachment have not been personally served, the justice obtains no jurisdiction of the person until the return of a summons. (§ 38) (*Id.*)
4. If therefore the defendant appears on return of the summons, joins issue, &c., without objecting to the sufficiency of the affidavit upon which the attachment issued, he waives an irregularity in that respect; and this is so, all though he appeared specially for the purpose, and took the objection on return of the attachment. (*Id.*)

NON-RESIDENT.

1. The defendant is a manufacturer and dealer in carriages. His store is on the corner of 10th street and Broadway in the city of New York; over his store is a furnished apartment in which he has his meals cooked and sleeps. This apartment he has occupied for fifteen years. About a year ago he hired a house in Litchfield, Connecticut, and moved his family into it from this city. This place defendant calls his home, and goes to it every week.
Held, on motion to vacate an attachment against defendant, that he is a non-resident, and that the motion should be denied. (*Murphy* agt. *Baldwin*, ante, 270.)

NOTICE.

1. When notice of recinding of a contract is given to such an agent or employe of one of the parties as is authorized to stand in his place and represent

him in his business, or in the particular branch of it connected with the subject matter of the contract, it is sufficient, though such notice is not brought home to the party himself. (*Dillon* agt. *Anderson*, 43 *N. Y.*, 232.)

2. The common law liability of common carriers cannot be limited by a notice, though such notice be brought to the knowledge of the person whose property they carry, but such liability may be limited by express contract. (*Blossom* agt. *Dodd's Express*, 43 *N. Y.* 264.)
3. The six months notice to creditors, given by the executors, under the Revised Statutes (2 *R. S.*, 89, § 39,) when duly published, exempts such executors from all liability to the creditors of their testator, whose claims are not presented, for any assets paid over in good faith by them, in satisfaction of claims of an inferior degree, or of legacies, or in making distribution to the next of kin. (*Erwin* agt. *Loper, Executor, &c.*, 43 *N. Y.*, 521.)

See PROMISSORY NOTE. (*Id.*)
VENDER AND VENDEE. (*Id.*)
APPEAL. (2 *Lansing*.)
COMMON CARRIERS. (*Id.*)
LIEN. (*Id.*)
MORTGAGE. (*Id.*)

NOTICE FILED IN TOWN CLERK'S OFFICE.

See LIEN (2 *Lansing*.)

NOTICE OF APPEAL.

10. The plaintiff, in an action on contract, before a justice of the peace, recovered \$135 78 damages and \$13 05 costs. The defendant appealed to the county court, and in his notice of appeal specified the following, amongst other particulars, in which he claimed the judgment should be more favorable to him:

"7th. The judgment should have been more favorable to the defendant in that damages should not have been so great by \$25."

"8th. Judgment should have been more favorable to defendant in that damages should have been not to exceed \$100, and should not have been more than \$75." (*Putnam* agt. *Heath*, ante, 262.)

11. In the county court the plaintiff had judgment for \$119 47 damages, being \$16 61 less than he recovered in the court below:

Held, that the plaintiff was entitled to costs. The statement in the appellant's notice of appeal is fatally defective. It is impossible for the respondent to know what sum the appellant is willing the judgment should be reduced, and it is this information he was bound to furnish by his notice—he should have named the *precise sum* to which the judgment should be reduced. (*The decision in the case of Gray agt. Hannah*, 30 How., 156, not concurred in, as there the notice of appeal was that the judgment of the justice should have been for a sum not exceeding \$35.) (*Id.*)

12. All that the statute requires is that the modification desired should be clearly and precisely stated, and its matters not in what language the statement is clothed, if the requisite precision and certainty are obtained. (*Id.*)

NOTICE OF TRIAL.

1. By the Code (§ 412) service of notice of trial by mail may be made sixteen days before the day of trial, including the day of service; and such service is good, although the last (16th) day falls on Sunday before Monday for which the cause is noticed. Therefore service made by mail, on the 4th of the month, for trial on Monday the 20th, is good. (*Central Bank of Westchester Co. agt. Alden*, ante, 102.)

It seems that the 2d subdivision of section 407 of the Code, providing for the computation of time, that "if the last day be Sunday it shall be excluded," does not apply to notice of trial by jury. (*Id.*)

NOTICE TO QUIT.

1. In an action of ejectment, where one of the defenses urged was that the defendants were the lessees, and had succeeded to the possession of tenants at will of the plaintiff, and had received no notice to quit under the statute:

Held, that the facts did not constitute them either tenants at will or by sufferance, and no notice to quit to them was necessary. (*Reckhow agt. Schanck*, 43 N. Y., 448.)

NUDE PACT.

See CONTRACT. (N. Y.)

O.

OFFER TO COMPROMISE.

1. The provisions of section 385 of the Code, allowing an offer of judgment, &c., by the defendant to the plaintiff are not applicable to equitable actions; e. g., an action to foreclose a mortgage (*Stevens agt. Veriane*, 2 Lansing, 90.)

OFFER TO PAY

See USURY. (43 N. Y.)

OFFICE AND OFFICER.

1. An appointment of a school district collector under the statute, (*Laws* 1864, Art. 3, Title 7, Ch., 555, § 32,) made by *parol*, by the trustees of the school district, does not vest the title of office in the appointee. The appointment should be made in writing as required by the statute, under the hands of the trustees; it is the incumbent's commission or warrant; and the statute having designated the mode and manner of making it, it becomes the very essence of the requirement. (*Hamlin agt. Dingman*, ante, 132.)

2. A *parol* appointment of the collector, by a sole trustee of the school district, the execution of the bond by the collector, the approval thereof by the trustee, together with the delivery of a tax warrant to him, constitute him an officer *de facto*, within the meaning of that phrase. And his acts as such *de facto* officer, are binding upon the public and third parties, and the title to his office cannot be inquired into collaterally. (*Id.*)

3. But so far as the officer himself is concerned, the government may try the right to the office by *quo warranto*; and the title to the office may also be questioned where he is a party, and is sued for an act which he can only justify as an officer. (*Id.*)

6. The sole trustee, (defendant) who attempted to create the collector an officer, and to endow him with the rights and functions of office, but disregarded the provisions of the statute as to the mode and manner of executing the power vested in him, stands in no better position. He is in no just sense a stranger to the acts and doings of the collector, and was not ignorant of the defects of his appointment, and knew it was void, and yet sets him in motion with a command to seize and sell the

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property of others. He is also liable to the plaintiff as a wrong-doer. (*Id.*)

See CORPORATIONS. (43 *N. Y.*)

LEGISLATURE. (57 *Barb.*)

TOWNS. (*Id.*)

ONUS PROBANDI.

See EXECUTION. (57 *Barb.*)

JUDGMENT. (*Id.*)

CARRIERS. (58 *Barb.*)

PARTNERSHIP. (*Id.*)

PROMISSORY NOTES. (*Id.*)

OPINIONS.

See EVIDENCE. (43 *N. Y.*)

1. Opinions can only be given by witnesses who are possessed of skill or science, upon the subject on which their opinions are asked. (*Stater* agt. *Wilcox*, 57 *Barb.*, 604.)

2. The degree of skill and science possessed is a question of law, for the court to determine, and which, in the appellate court, can be reviewed. (*Id.*)

3. A liberal rule should be applied in regard to evidence concerning diseases in animals; it being rare that persons can be found who make the treatment of diseases in domestic animals a distinct profession, or attain to a great skill or science therein. (*Id.*)

4. The best skill and science that can be expected—all that can be practically admitted in such cases—is the evidence of persons who have had much experience, and have been for years made acquainted with such diseases, and their treatment. They may give their opinions upon such experience, and on statements of fact upon which their opinions are based, as *some* evidence, to be considered and weighed. (*Id.*)

5. Where, in an action to recover damages for a breach of warranty, in the sale of a cow, a witness, after stating that he had owned cows that had the horn distemper, and had doctored them, was asked "how does the horn distemper affect the cow?"

Held, that although the form of the question might be deemed to call for an opinion, yet that an answer stating the witness's experience in such cases, being as to a matter of fact, was admissible, not as an opinion, but as a fact. (*Id.*)

6. The opinion of a witness as to the value of services rendered by the plaintiff to the defendant, (1) In procuring the

defendant's paper to be discounted, and procuring loans for him in that way; (2) In indorsing the defendant's paper, and thus aiding him with his credit, either by way of sale or loan of credit; (3) For time, travel and expenses in going to different banks and places to get the defendant's paper discounted and renewed, is inadmissible. (*Perrine* agt. *Hotchkiss*, 58 *Barb.*, 77.)

7. Opinions of witnesses are not competent to fix a price for the use of credit, where no price was agreed upon; for the reason that credit cannot be said to have any regular and current market value. (*Id.*)

8. If time, travel and expense are expended or incurred by an indorser, for his principal, independently of the brokerage, the indorser may recover therefor, upon the general promise to pay, whatever sum he can prove the services to be worth, not to the defendant, in the particular circumstances in which he was placed, but according to the general price and value of such services. (*Id.*)

9. This may be proved by the opinions of witnesses who are qualified to judge of the value of the services. (*Id.*)

ORDER.

See PRACTICE. (2 *Lansing.*)

ORDER OF COUNTY COURT.

See INSOLVENT DEBTOR. (2 *Lansing.*)

OVERSEER OF HIGHWAYS.

See HIGHWAY. (2 *Lansing.*)

OWNERSHIP IN COMMON.

1. One or two owners in common of a chattel, being in sole possession, let it for an agreed price. The hirer was ignorant of the ownership in common, but being afterward notified of it, refused when the hire was due, to pay his bailor more than that portion thereof, which represented the latter's interest; the bailor sued to recover the balance, and the hirer set up an assignment of the same from the other owner in common, and that upon an accounting for profits of the chattel, a balance would be found due to him as such assignee, but failed to establish the latter allegation.

Held, that the bailor could recover the balance of the price agreed. (*Foster* agt. *Magee*, 2 *Lansing*, 182.)

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2. Owners in common of grain or other personal property, in its nature separable in respect to quantity and quality by weight or measure, may sever their portions of the common bulk at will; and where one of such owners is in possession of the whole, his refusal to permit the separation by another owner, of the latter's share, is equivalent to conversion, and trover will lie in consequence. (*Channon* agt. *Lusk*, 2 *Lansing*, 211.)

P.

PARADE GROUND.

See MANDAMUS. (58 *Barb.*)

PARENT AND CHILD.

See APPRENTICE. (43 *N. Y.*)

1. Where the mother of a child who is fatherless, is abundantly competent to provide for her, and there is no allegation of her unfitness, she is the proper person to have the custody of the child, instead of strangers. (*The People* *ex rel. Barbour* agt. *Gates*, 57 *Barb.*, 291.)
2. In such a case the preferences of a child nine years of age will be entirely disregarded. (*Id.*)

See APPRENTICES. (*Id.*)

PRINCIPAL AND AGENT. (*Id.*)
PAUPER. (2 *Lansing*.)

PARTIES.

1. A party to an action may be compelled to attend for his examination before a judge, as a witness, under section 391 of the Code, in whatever county he is served with a summons and notice to attend for such examination, although he be a resident of another county. (It seems that this section of the Code should be amended in this respect, as it may operate oppressively and prejudicially to the party to be examined in many cases.) (*Todd* agt. *Lambden*, *ante*, 230.)
2. A plaintiff who seeks to obtain an account of the personal estate which came to the hands of an administratrix—she being dead, her personal representatives are indispensable parties. (*Silsbee* agt. *Smith*, *ante*, 418.)
3. And the persons who are in possession of the lands sold by the surrogate to pay the testator's debts, are interested in having the administratrix,

representatives made parties to the end that it may be established, if it can be, that debts of the testator were unpaid at the time the order of the surrogate to sell was made. (*Id.*)

4. An offer to pay whatever may be found due upon the mortgages is an indispensable avowment in a bill to redeem, or a tender of an amount which the plaintiff concedes to be due. Without one or the other of these avowments, the complaint does not state a cause of action. (*Id.*)

5. The law of this state no longer permits actions to be prosecuted in the name of nominal plaintiffs. The moment the fact appears that the plaintiff is not the real party in interest, the action is ended; no matter what is the character of the instrument on which it is founded; whether negotiable or not; or whether the defendant has or has not, any defense to the indebtedness. (*Eaton* agt. *Alger*, 57 *Barb.*, 179.)

See HUSBAND AND WIFE. (*Id.*)

PROMISSORY NOTES. (*Id.*)

6. Where fraudulent assignments made by a judgment debtor are obstacles in the way of a creditor's collecting his demand, all who have participated in creating them are properly made parties to an action to set the assignment aside. (*Bennet* agt. *McGuire*, 58 *Barb.*, 625.)

See APPEAL (2 *Lansing*.)

PAUPER. (*Id.*)

PLEADING. (*Id.*)

PARTITION.

1. By parol between two having a contract for land, good between themselves. (*Taylor* agt. *Taylor*, 43 *N. Y.*, 578.)
2. All the parties to an action for partition were the heirs at law of a former owner of the premises, who died intestate, and they took title to the lands in question by descent, as such heirs. The complaint alleged that each of the nine parties, plaintiffs and defendants, was seized in fee simple, and entitled to one equal undivided ninth part of said premises. The judge before whom the action was tried, without a jury, found as matter of fact, and held as a conclusion of law, that eight out of the nine parties and heirs, had been advanced by the intestate, in sums differing in amount; to the ninth, no advance whatever had been made; and yet the judge held and decided, as a

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- conclusion of law, and adjudged, that the parts and shares of said premises, "belonging to the plaintiffs and other parties to the action" were "correctly stated and set forth in the complaint;" and that the plaintiffs were "entitled to judgment for partition and division of said lands and premises between them as demanded in said complaint;" which was, that partition might be made according to the rights and interests of the several parties as before alleged. The judgment or decree followed the conclusion of law, and adjudged and decreed that "each of said plaintiffs and defendants is entitled to the equal undivided one ninth part of said lands and premises." No notice was taken of the advancements, in the decree, or in the conclusions of law, but each party was decreed and adjudged to be entitled the same as though no advancement had been made. *Held*, that this was manifest error, and that the exceptions to the findings and conclusions of law, in this respect were well taken. (*Hobart* agt. *Hobart*, 57 *Barb.*, 296.)
3. That it was quite probable, in view of all the facts presented, that some of the parties had no share or interest, whatever in the lands in question; and that it was certain that the shares of such as did inherit were altogether unequal in proportion, inasmuch as their advancements all differed in amount. (*Id.*)
 4. That the party who had not been advanced at all had inherited much the largest share, and possibly the whole, depending upon the value of the premises, as compared with each of the several advancements. (*Id.*)
 5. The statute (1 *R. S.* 754, §§ 23, 24,) provides that the value of all advancements made to children by an intestate, shall be reckoned as part of the real and personal estate of the intestate; and if any advancement shall be equal or superior to the amount or share which the child so advanced would be entitled to receive of the real and personal estate of the deceased, then such child and his descendants shall be excluded from any share of the real and personal estate of the deceased. And in case the advancement is less than such share, then the child so advanced shall be entitled to receive so much, only, of the personal estate, and to inherit so much only of the real estate of the intestate, as shall be sufficient to make all the shares of the children in such real and personal estate, and advancements, to be equal, as near as can be estimated. (*Id.*)
 6. Where the rights and interests of the several parties in partition suit, have, by the judgment or decree, been adjudged and decreed to be altogether different from those to which they were entitled by law, it seems there is no way by which the error can be remedied, except by a reversal of the judgment, and the ordering of a new trial. (*Id.*)
 7. It is no answer to an objection that a decree in partition is erroneous in its adjudication as to the rights and interests of the several parties, in the premises, that inasmuch as the lands have been ordered to be sold and the proceeds of the sale over and above costs and expenses, brought into court, the rights of all the parties may be adjusted properly in the distribution of the proceeds; because the proceeds can only be distributed according to the respective rights of the parties as adjudged and determined by the decree or judgment; and each party will have the same interest in the proceeds of the sale that he had in the land sold. (*Id.*)
 8. Where, in a partition suit, the defendants alleged in their answer that certain conveyances made to parties to the suit, by the former owner of the premises, by way of advancements, were void by reason of undue influence, and incompetency of the grantor; and the court, on the trial, refused to hear the evidence offered in support of such answer, as being irrelevant; *Held*, that the error in the ruling, if any, was waived and abandoned when the defendants used those conveyances to establish their defense of advancements made to the several grantees, by such conveyances; and that they could not be heard to complain that they were not allowed to contest their validity. (*Id.*)
 9. Where a decree in partition required the referee to pay and discharge, out of the proceeds of the sale, all taxes, charges and assessments which might be a lien on the premises; instead of which, as appeared by his report of sale, he sold subject to such liens; *Held*, that the order confirming the report was erroneous, and the same was reversed, and the sale set aside and vacated as being contrary to the decree. (*Id.*)
- ### PARTNERSHIP.
1. An action may be maintained against the representatives of a deceased partner upon a partnership liability, when

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it is proved that the surviving partner is wholly insolvent, without first exhausting the remedy, at law against him. (*Van Riper* agt. *Poppenhausen*, 43 N. Y., 68.)

2. All commercial partnerships existing between citizens of the two contending parties in the late war with the southern states, were dissolved by the war. (*Woods* agt. *Wilder*, 43 N. Y., 164.)

3. A and B being copartners, A upon his individual credit obtains a loan from C of \$1,200, which is used in the partnership business, but is credited to A personally on the partnership books, and so remains with A's knowledge and without any dissent on his part for five years; at the end of that time, A and B enter into an agreement for the settlement of the partnership affairs, by which B, among other things, agrees in one year to satisfy and discharge all the liabilities of the firm, except those to A.:

Held, that the loan of \$1,200 was personal to A, and that B was not obliged under his agreement to pay the amount to C. (*Gibbs* agt. *Bates*, 43 N. Y., 192.)

4. The amount of a partnership deposit with an insolvent banker is a proper subject of set-off, in an action brought by the assignee in trust for creditors of such banker, on a note held by the banker made by one of the partners and indorsed by the other for partnership purposes, although such note was not due at the time of the assignment. (*Smith* agt. *Fulton*, 43 N. Y., 419.)

5. One who is interested in the securities pledged by an individual bank for its circulating notes, and who has signed the certificate prescribed by section 6 of the act of 1854, (chap. 242,) is responsible to third persons as a general partner in such bank. (*Julian* agt. *Watson*, 43 N. Y., 571.)

6. The continuation of the business of banking after the death of one of the partners, is, as to all the survivors interested in the securities upon which the business is continued, a continuation of the partnership, and they remain liable as partners therein. (*Id.*)

7. Although, ordinarily, one partner cannot sue his copartner, at law, in respect to partnership dealings, if the cause of action is distinct from the partnership accounts, and does not involve their consideration, the action may be maintained. (*Howard* agt. *France*, 43 N. Y., 593.)

8. When one partner becomes liable to his copartner, in an action at law, for the portion of partnership funds in his hands belonging to such copartner, the form of such action is properly for money had and received by the defendant to the use of the plaintiff. (*Rainsford* agt. *Rainsford*, 57 Barb., 58.)

9. The cases in this state are quite uniform in holding that there must be not only a settlement, but an express promise to pay, before an action at law by one partner, to recover his share of the partnership moneys, against another partner, can be maintained. (*Id.*)

10. One member, of a partnership firm cannot become the individual owner of the partnership property, without the consent, and against the wishes, of the other member. (*Comstock* agt. *Buchanan*, 57 Barb., 127.)

11. Although one partner may sell the property of the firm, and give a good title, to a third party, he cannot sell to himself. (*Id.*)

12. A sale to himself is simply void; no right or interest passes; the legal and equitable title remains as it was before the attempted transfer. It is still the property of the firm, though standing in the name of the individual partner. (*Id.*)

13. Thus, where stock belonging to a partnership firm was surrendered by one of the partners, without the knowledge or consent of his partner, to the company, he representing to the secretary that he had authority from, and the consent of, his partner to do so, and procured new scrip to be issued to him, in his own name, in lieu thereof:

Held, that the transfer was fraudulent and void; and that an assignee of the partner not consenting to the transfer could maintain an action to have the stock restored, and the title thereto placed in the name and under the control of its rightful owners, subject to such equities as existed against it at the time of the sale to him. (*Id.*)

14. In an action between partners, for a settlement of the copartnership affairs and to recover a balance claimed by the plaintiff to be due to him, a receiver will not be appointed to sell stock owned by the parties jointly, though in proportions dependent on the state of the partnership, accounts before it is judicially determined how much of the stock belongs to each party; where no insolvency is alleged, and the defendant denies the entire equity of the complaint, and offers and consents that

See ACTON. (*Id.*)

SPECIAL PARTNER. (*Id.*)

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one half of the stock may be transferred to the plaintiff, and to give security to indemnify him for any balance he may establish in his favor. (*Buchanan* agt. *Comstock*, 57 *Barb.*, 568.)

See COMPLAINT. (Id.)**EXECUTORS AND ADMINISTRATORS. (Id.)**

15. On the formation of a partnership between S. & I. under the firm name of "J. S.," a note was made by S. in his own name, which he procured to be discounted by the plaintiff, for the purpose of enabling him to pay in his share of the capital. S. did not represent to the plaintiff that it was a firm note; and the payees, as officers of the plaintiff's bank, knew, or had good reason to believe, that the note was not the note of the firm, but was the individual note of S.

Held that I. was not liable as a party to the note, in any form; and no recovery could be had against him by the plaintiff as holder thereof. (*The National Bank of Chemung* agt. *Ingraham*, 58 *Barb.*, 290.)

Held, also that even if the note had been discounted after the partnership had commenced business, the legal presumption would be that it was the note of the individual who signed it, and not the note of the firm. (*Id.*)

16. That to entitle the holder to recover in such a case, against the partners, it must go further, and prove either that the money for which the note was given was borrowed on the credit of the partnership; or that it was used, when obtained, in the business of the partnership. (*Id.*)
17. That the burden of proof was upon the plaintiff, to show that the note was discounted upon the credit of the partnership. (*Id.*)

18. That if the lender did not know of the partnership, or if the money was loaned on the individual credit of the maker of the note; the fact that the money was applied to the business of the firm did not create a liability on the part of the firm, or constitute the lender a creditor of the firm. (*Id.*)

See PROMISSORY NOTES. (Id.)

19. After notice has been given to a firm creditor by each of the partners that one of them has withdrawn, and that the other will continue the business and has agreed to pay individually the firm debts, transactions between the creditor and continuing partner must

be considered with a reference to the new relations of principal and surety existing between the late partners, in determining the question whether any such transaction amounts in favor of the retired partner to a payment of the firm debt. (*Colgrove* agt. *Tallman*, 2 *Lansing*, 97.)

20. Where a member of a partnership firm advances money for its business beyond what is required of him by the copartnership agreement, he is entitled to interest on such advances. (*Lloyd* agt. *Carrier*, 2 *Lansing*, 364.)

21. An agent of the firm after its dissolution and a settlement of the firm accounts between the members thereof, except as to an outstanding partnership claim, collected the claim, and paid it over, in different amounts to two of the partners, there being five altogether. One of the partners, who had received none of the money, sued all the rest for an accounting, claiming to recover his proportion of the sums so paid; the referee, without ascertaining the amount, directed judgment against them all as claimed.

Held, that there was no joint liability of the defendants, but that they were liable severally for the plaintiff's proportion of the sum received by them respectively, and that such sums being unascertained, the judgment was erroneous, and must be wholly reversed. (*Rhiner* agt. *Sweets* 2 *Lansing*, 386.)

See ACCOUNT STATED. (Id.)**APPEAL. (Id.)****CORPORATION. (Id.)****PAYMENT. (Id.)****PLEADING. (Id.)****PATENT.****See ESTOPPEL, (57 Barb.)****PROMISSORY NOTES. (Id.)****PAUPER.**

1. An order for the support of a poor person, under 1 R. S., § 1, *et seq.*, is not invalid, because two out of five children of such person, are directed to contribute thereto, in unequal amounts. (*Stone* agt. *Burgess*, 2 *Lansing*, 439.)
2. The liability of the children charged by the order is several, and either is liable on default, in an action to recover the payment required of him by the order. (*Id.*)
3. An action also lies for the costs awarded on granting such order, against the parties severally charged therewith under section 6. (*Id.*)

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4. In counties where all the poor are a charge upon the county, the action is properly brought by the superintendent of the poor (§ 13). (*Id.*)

PAYMENT.

1. The defendants being indebted to the plaintiff for goods sold, gave him the promissory note of a third person, which was received by him in full payment and discharge of the debt. The maker of the note was insolvent at the time of the transfer of the note, though this fact, was unknown to the parties.

Held, that it was a case of mutual mistake of fact, and that the plaintiff was entitled to recover from the defendants his original debt. (*Roberts agt. Fisher*, 43 N. Y., 158.)

2. Where the payee of a draft, on the day of its receipt by him, and in banking hours, presents and surrenders it to the drawee, and receives therefor the drawee's check, which check was presented to the bank on that day, would have been paid and on the next day the check is presented to the bank for payment and payment refused, and the drawers of the draft at once advised by letter of the non-payment of the check.

Held, that the check could be operative as payment only by express agreement; but that although as between the said drawee and payee the payee was not bound to present the check until the day after its receipt by him, yet that between the drawers and payee of the draft, it was the duty of the payee to present the check at once, and he was guilty of laches in not so doing, and was chargeable with the consequent loss. (*Smith agt. Miller*, 43 N. Y. 171.)

2. Accordingly, where upon a sale of a bill of goods to the defendants, the plaintiff received from them for the price a draft, which the plaintiff presented to the drawee, and took his check, and gave up the draft a delay of one day to present the check, during which time the drawee failed, was laches, and precluded the plaintiff from recovering the price of his goods from the defendants. (*Id.*)

See APPROPRIATION OF PAYMENTS. (*Id.*)

TAXES. (*Id.*)

3. In June, 1864, T. sold out his interest in the firm of B & T to B who assumed payment of the firm debts; C, the

holder of a firm note, was duly notified of the dissolution and assumption and was requested by T to collect the note at once; payments on the note were made by B, and when in June, 1865, C formally demanded payment in full for the purpose, as he said, of investing in United States bonds, B, who held bonds more than sufficient to balance the note, offered to give C instead of money a receipt for an equal amount of bonds; the balance due on the note and its equivalent in bonds, were adjusted between them, and B gave C a receipt stating that he had received from C the bonds, to be held by him for safe keeping, and to be returned to C on surrender of receipt, which was duly stamped and delivered; the note was not in fact surrendered by C, and the bonds remained in possession of B, who made a further payment on the note, and in July 1866, made a general assignment for the benefit of creditors; C then demanded possession of the bonds, but did not get them, and subsequently for the first time, demanded payment of the note from T, and on refusal sued B & T on the note; B had told T that the note was paid, but on the trial before a referee a conflict as to whether C had promised to surrender the note, and hold the receipt in its stead. On appeal by T from a judgment for the plaintiff.

Held, reversing the referee's finding of fact, that the receipt for the stock was taken in payment of the note, and the judgment against the appellant, could not be sustained. (*Colgrove agt. Talman*, 2 Lansing, 97.)

PAYMENT OF FREIGHT.

See BILL OF LADING. (2 Lansing.)

PERFORMANCE.

See STATUTE OF FRAUDS. (2 Lansing.)

PERPETUITIES.

1. Where a testator bequeathed the residue of his estate to nine trustees, for the establishment of an hospital for the reception and relief of sick and diseased persons, and directed them to apply to the legislature for a charter to incorporate the same, and in case the legislature should refuse to grant the same within two years next after his death, provided two lives named in his will should continue so long, then the trustees

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were to pay over the same to the United States:

Held, that the provision did not violate the statute of perpetuities, but that the corporation could take only in case the charter was granted within the two years. (*Burrill* agt. *Boardman*, 43 N. Y., 254.)

2. The power of alienation of real estate may lawfully be suspended for the term of a minority after the expiration of two lives in being, by means of contingent remainder, to take effect in the event of the death of the first remainder-man in fee during his minority. (*Manice* agt. *Manice*, 43 N., 303.)

3. But the absolute ownership of personal estate cannot be suspended beyond two lives in being. (*Id.*)

4. A remainder in fee in real estate, to take effect after the expiration of two lives in being, at the testator's death, may be created in favor of a person not in being at that time; and in such a case a further contingent remainder in favor of a person not in being at the creation of the estate may be limited, to take effect in the event that the person to whom the remainder is first limited shall die under the age of twenty-one years. (*Id.*)

5. The testator created trusts of real and personal property, to receive the income and apply it during the life of his widow, and, upon her death, to divide the property into shares; and as to the share of each daughter, to receive the income, and apply it to her use during her life, and after her death to divide her part into as many shares as there should be children of such daughter living at the time of her death, and to retain one of such shares for each of said children, and accumulate the net income thereof during his or her minority, and, on his or her arriving at age, to pay the same over to him, or her, with its accumulations, with contingent limitations over of the shares of any of such children who might die during minority:

Held, that these contingent remainders and the trusts for accumulation, were valid as to the real estate and void as to the personalty. (*Id.*)

6. That the failure, as to the personalty, of these trusts for accumulation during the minority of the testator's grandchildren, and of the contingent limitations over in case of their death in infancy, did not invalidate the other dispositions of the will. (*Id.*)

7. That the effect of declaring them void

would be to vest the personalty absolutely in the children of each daughter on the death of their mother. (*Id.*)

8. The policy of this state does not interdict perpetuities or gifts in mortmain in other states. (*Chamberlain* agt. *Chamberlain*, 43 N. Y., 424.)

9. A bequest to trustees of personal estate to invest and reinvest, and pay over the income to an incorporated academy forever, is void under the statute of perpetuities. (*Adams* agt. *Perry*, 43 N. Y., 487.)

10. *Williams* agt. *Williams*, (4 *Seld.*, 524,) so far as it holds the contrary overruled. (*Id.*)

11. The only power, in educational corporations to hold property in perpetuity in trust is by virtue of their charter and the acts of 1840 and 1841. (*Id.*)

See WILLS. (*Id.*)

PIER.

See NEGLIGENCE, (58 *Barb.*)

PLACE OF TRIAL.

1. Where an order is made, changing the place of trial in a cause to another county the change is effected at once. The transfer of the papers is a subsequent clerical duty. (*Fisk* agt. *Albany & Susquehanna R.R. Co.*, ante, 365.)

2. This change is not affected by a subsequent chamber order to show cause why the order making the change should not be corrected, with a stay of proceedings mean time, and with an order forbidding the county clerk to transfer the papers in the cause. (*Id.*)

3. Nor is the order making such change, affected by a subsequent appeal therefrom to the general term. (*Id.*)

4. It is very doubtful whether an order changing the place of trial for the convenience of witnesses is appealable.

5. Where the place of trial is located in the city and county of New York, and on motion it is changed to another county, no motion can be heard in the cause in the first district. (*Id.*)

5. Where the judge has settled an order in his own language, on a hearing of both parties, no other court is competent to correct the order which he has thus settled. (*Id.*)

7. The place of trial of actions brought in the supreme court may be changed only

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in those cases mentioned in section 123 of the Code; and the convenience of the justice trying the cause is not one of those cases. When the place of trial is changed, and an objection is duly taken thereto, at the time, the fact that the party so objecting afterward appears on the trial is not a waiver of the objection already taken. (*Birmingham Foundry agt. Hatfield*, 43 N. Y., 224.)

PLEADING.

1. Upon a criminal trial, after the prisoner has pleaded "not guilty," it is within the discretion of the court to permit him to interpose a special plea, setting up defects in the organization of the grand jury which found the indictment, and a refusal to allow the plea cannot be alleged as error. (*People agt. Allen*, 43 N. Y., 28.)

See CONTRACT. (*Id.*)

COUNTER CLAIM. (*Id.*)

USURY. (*Id.*)

SUPPLEMENTAL COMPLAINT. (*Id.*)

2. Under our present system, if a pleading is not so bad as to show on its face that it is frivolous, no argument should be allowed, and the party should be left to a demurrer. (*The Joseph Dixon Crucible Company agt. The New York City Steel Works*, 57 Barb., 447.)

3. A pleading, to be frivolous, must show its defects on the first inspection. (*Id.*)

See COMPLAINT. (*Id.*)

PROMISSORY NOTES. (*Id.*)

4. When the defense in an action against members of an association jointly liable, is a non-joinder of all the associates as defendants, the party omitted must be pointed out by name, or judgment will go against the defendant's named. (*Kingsland agt. Braisted*, 2 Lansing, 17.)

5. Nor when the action was brought by a firm, several of the partners being also members of the association, but not joined as defendants, and the defense of non-joinder is not properly pleaded is an objection available to the defendants, that one member of the association may not sue another. (*Id.*)

6. And upon the authority of *Cole agt. Reynolds* (18 N. Y. Rep., 74), the joinder of law and equity jurisdiction under the Code, would render the objection unavailing as a defense. Per *INGRAHAM, J.* (*Id.*)

7. The plaintiff sued the representative

of a deceased judgment debtor and the surviving co-judgment debtor, upon a judgment in usual form, recovered nearly twenty years previously, on contract against the defendants therein, alleging execution returned unsatisfied against the said defendants, and the insolvency of the survivor.

Held, on demurrer, for want of a cause of action, that the complaint was good. (*Stahl agt. Stahl*, 2 Lansing, 60.)

8. It is sufficient, in such an action, if the complaint states the survivor's insolvency, without averring the issuing and return of an execution unsatisfied against him. (*Id.*)

9. Where the complaint averred a wrongful taking and carrying away, and conversion of the plaintiff's timber from certain described premises, and the answer denied the plaintiff's ownership of the *locus in quo*, and evidence had been admitted without objection on the trial to prove injury to growing timber.

Held, that a cause of action for trespass to land was sufficiently pleaded. (*Phillips agt. DeGroat*, 2 Lansing, 192.)

10. Where the complaint alleged the taking of goods "particularly mentioned in the affidavits heretofore served upon the defendant in this action."

Held, that the affidavit was for the purpose of describing the goods made part of the complaint. (*Nichols agt. Mead*, 2 Lansing, 222.)

11. The plaintiff brought a suit on the 2d December, 1867, to recover upon an annuity charged, in his favor, on the defendant, from January 1st, 1855, and the complaint averred that no part of the annuity had ever been paid. The defendant pleaded the statute of limitations. On the trial, the plaintiff proved, without objection, a payment by the defendant on account of the annuity on the first of January, 1864.

Held, that the referee was justified in reporting in the plaintiff's favor for the sums falling due after January 1st, 1858. (*Mensch agt. Mensch*, 2 Lansing, 235.)

See ASSIGNMENT OF MORTGAGE. (*Id.*)
EXECUTORS AND ADMINISTRATORS. (*Id.*)

EVIDENCE. (*Id.*)

INDICTMENT. (*Id.*)

PRACTICE. (*Id.*)

MONEY HAD AND RECEIVED. (*Id.*)

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PLFEDGE.

See VENDOR AND PURCHASER OF LAND
(2 *Lansing*.)

POWER.

1. Whenever a statute grants the power to do an act, with an unrestricted discretion as to the manner of executing the power, all reasonable and necessary incidents in the manner of executing the power are also granted. (*The People ex rel. Wilbur* agt. *Eddy*, 57 *Barb.* 593.)

2. Hence, although a statute is very summary in its grant of power, and fails to prescribe the form of proceeding to effect the desired object, it is not for that reason unconstitutional and void. (*Id.*)

See LEGISLATURE. (*Id.*)

3. The supervisors of Cattaraugus county had power under the act of April 17th, 1865 (chap. 479, p. 860), to appoint three building commissioners, to locate and erect county buildings at Little Valley, who should have authority to consider donations of land and money in determining the location; by their resolution of appointment they directed their appointees to select and procure the title to a proper site for a sum not exceeding one dollar, and to proceed to erect the buildings thereon, but neither to obtain the title, nor take any binding steps until security should be given by bond of individuals and otherwise, guaranteeing payment for the erection of the buildings without expense to the county.

Held, that the power to accept donations of money was vested in the supervisors, by whom provision for supplying the means for erecting the building had to be made, and not in the building commissioners, and that a bond given as security for payment of donations, under the resolution, was within the policy of the law, and valid. (*Marsh* agt. *Chamberlain*, 2 *Lansing*, 287.)

4. And the said building commissioners having proceeded according to the terms of the resolution to locate, erect and furnish the county buildings in part upon the faith of a bond given to secure payment of money promised in that respect.

Held, that such bond was founded upon sufficient consideration. (*Id.*)

5. And that one who had at the day of its date, and before delivery, indorsed upon the same over his signature, "I

guarantee payment of the within bond," was bound by the guarantee, and that this was so, irrespectively of the amendment of the statute of frauds. (1863, chap. 464). (*Id.*)

6. The act of 1868 (chap. 13, § 1), authorizing an assignment of the bond to the supervisor of Little Valley.

Held, that an assignment made to said supervisor of the same with the guarantee, would be presumed to have been made under that act. (*Id.*)

7. And any two of the building commissioners being authorized to erect the county buildings (1865, chap. 861, § 3).

Held, that an assignment of such bond and guarantee by that number of said commissioners was sufficient, as an act incidental to the duties devolved upon them. (*Id.*)

See ASSIGNMENT OF MORTGAGE. (*Id.*)

POWER OF DISPOSITION.

See DEVISE. (2 *Lansing*)

POWERS IN TRUST.

1. R. by will, after the payment of his debts, gave to his executor all his estate, in trust for the following uses and purposes: to pay and apply the whole net income to the use and support of his mother and his wife (the defendant) share and share alike, during the life of his mother, permitting them to occupy his farm during her life; and upon her death to pay two specified legacies. He also directed the executor to invest a certain sum, and apply the income to the support of certain legatees. By the fifth clause, he gave "all the rest, residue and remainder of his said estate to his beloved wife, Jane Rhend, and to her heirs and assigns forever, which was to be accepted and received in lieu of dower and right of dower; and he hereby authorized and empowered his said executor to sell and convey his real estate at any time after the death of his said mother, and to pay over the proceeds thereof to his said wife:

Held, that the power to sell, given to the executor, was legal and valid, as a power in trust and not inconsistent with or repugnant to the residuary devise. (*Skinner* agt. *Quia*, 43 *N. Y.*, 99.)

See DEVISE (*Id.*)TRUSTS AND TRUSTEES. (*Id.*)

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PRACTICE.

1. An order, procured by a party against whom judgment is ordered, directing the successful party to enter such judgment, so that an appeal may be taken, is proper and in accordance with regular practice. (*Skinner* agt. *Quin*, 43 N. Y., 100.)

See ARREST OF JUDGMENT. (*Id.*)BILLS OF EXCHANGE. (*Id.*)COSTS. (*Id.*)FORECLOSURE. (*Id.*)PLACE OF TRIAL. (*Id.*)PLEADING. (*Id.*)TRIAL. (*Id.*)USURY. (*Id.*)

2. For defects or irregularities not affecting the jurisdiction of the court, and where no fraud or collusion is imputed, the remedy is given to the party, alone; and another judgment creditor is not entitled to have such proceedings or judgment set aside. (*Gere* agt. *Gundlach*, 57 Barb., 13.)

3. An order for a substituted service of the summons and complaint, obtained upon a sheriff's return that the defendant cannot be found, that the summons and complaint cannot be served personally, and that he has left to avoid proceedings against him by his creditors, and upon an affidavit which does not contain the statements required by chapter 511 of the laws of 1853, as amended by chap. 212 of the laws of 1863 is not warranted by the statute; and a service made under it will not confer jurisdiction. (*Id.*)

4. A general exception to the charge of the court, not specifying any grounds of error, is of no avail, where there is no request to charge otherwise. (*The People* agt. *Smith*, 57 Barb., 46.)

5. Where an action was tried wholly upon the issue whether the plaintiff, or her husband, was the defendant's partner in business, and the judge charged the jury that the plaintiff was entitled to recover her share of the assets, as ascertained by a settlement and balance struck, if she was the partner of the defendant:

Held, that the defendant having taken no exception to the charge, he must be deemed to have acquiesced in that view of the case, and could not object or except on appeal. (*Rainsford* agt. *Rainsford*, 57 Barb., 58.)

6. A mere general exception to a judge's charge, where there is more than one point in such charge, and any portion

of it is unexceptionable, is of no avail, if there is nothing to show to which part or proposition in the charge it is intended to apply. (*McAndrews* agt. *Santee*, 57 Barb., 193.)

7. Upon a trial by the court the successful party is under no obligation to submit a draft of the judgment to the adverse party, for amendments. The court may, in its discretion, require it, and direct that the judgment be settled before itself or one of its members. (*The People* agt. *The Albany and Susquehanna Railroad Co.*, 57 Barb., 201.)

8. In case the decision of the court fails to find upon all the facts deemed by the unsuccessful party to be material, his remedy is to propose a finding thereon in his proposed case and exceptions; and it is the duty of the judge, on the settlement thereof, to pass upon the same and to find as requested, or to refuse to so find, so that the party may have the benefit of an exception to his refusal. (*Id.*)

9. An order staying all proceedings on the "decision" of the court, if not served until after the entry of judgment, becomes *functus officio*, and does not operate as a stay of proceedings after judgment. (*Id.*)

10. An order staying all proceedings under a judgment does not, it seems, stay an independent proceeding against a receiver in the action, to compel him to surrender property he is ordered thereby to deliver to the successful party. (*Id.*)

11. If otherwise, an order directing such surrender can only be attacked on a direct proceeding to set it aside. (*Id.*)

12. Proceedings to compel the delivery of property, upon a judgment for costs and the delivery of property, are not stayed by an undertaking conditioned to pay such costs and the costs of the appeal. (*Id.*)

13. If a party has been exercising his legal right, the court cannot inquire into his motives for so doing. (*Id.*)

14. It is proper and quite usual for the court, especially in cases where the findings are long, to furnish the attorney of the successful party with a brief minute of his decision, and request him to prepare proposed findings of fact and conclusions of law. When corrected and signed, the court usually delivers the decision to the successful party, to be filed. (*Id.*)

15. Matters set forth in motion papers,

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- or filed, which are not material to the decision, are impertinent, and if reproachful, are scandalous, and may be suppressed by the court on inspection. (*Id.*)
16. A motion to set aside an order appointing a referee to take the deposition of a witness, under section 401 of the Code of Procedure, must be made by the witness, himself, and not by the adverse party. (*Ramsey* agt. *Gould*, 57 *Barb.*, 398.)
17. In deciding cases submitted under § 372 of the Code, the court is to draw from the facts stated such conclusions as a jury would be warranted in drawing, if the case was on trial before them. (*Clark* agt. *Wise*, 57 *Barb.*, 416.)
18. When a second motion is based upon a new state of facts arising since the first decision was made, it is not necessary that leave to make the motion should be obtained. It may be made as a matter of right. (*The Erie Railway Company* agt. *Ramsey*, 57 *Barb.*, 449.)
19. A motion on the part of defendants, on 12 hours' notice after serving papers at Albany, to vacate a stay of proceedings made at Delhi; and a stay of proceedings served at New York, at about 10 o'clock a. m. on the 31st day of May, to prevent the making of a motion at Delhi or Binghamton, on that day, cannot be said to be proper and orderly proceedings consistent with a due administration of justice. (*Ramsey* agt. *The Erie Railway Company*, 57 *Barb.*, 450.)
20. To give an order staying proceedings on a motion vitality, it should be served in time to be communicated to the counsel acting at the court where the motion is to be made. (*Id.*)
21. If such counsel takes an order in pursuance of the notice of motion, without any knowledge of a stay of proceedings having been granted, although an order for a stay had about that time been served, in a different city, his proceeding will not be irregular. (*Id.*)
- See AMENDMENT. (*Id.*)
APPEAL. (*Id.*)
22. Where exceptions are taken upon the trial, or after its close to findings and refusals to find, by the referee, but upon the brief and argument on appeal, no point is taken upon such rulings, the court may assume that they are waived, or not relied upon by the appellant. (*Churchill* agt. *Stone*, 58 *Barb.*, 233.)
23. The examination of witnesses upon commission being under the authority of a statute must be in strict obedience to the statute rule. It is a departure from the common law practice, and is susceptible of great abuse, unless a rigid rule is observed in practice. (*Terry* agt. *McNiel*, 58 *Barb.*, 241.)
24. The testimony of a witness taken upon a commission will be stricken out on the trial if it is evasive, irresponsible or untruthful, or the witness has not fully and fairly answered the cross-interrogatories. (*Id.*)
25. Where, in the course of a trial at the circuit, the defendant objects to evidence offered by the plaintiff, and excepts to the ruling of the justice admitting it, it is erroneous to order a verdict in favor of the plaintiff, subject to the opinion of the court, as the defendant is thereby deprived of the opportunity of having his exceptions considered. (*Briggs* agt. *Merrill*, 58 *Barb.*, 389.)
26. Such a ruling, under such circumstances, is a mistrial; and a new trial should be ordered on account of the error, unless the exceptions are waived by the defendant. (*Id.*)
27. If the plaintiff moves for judgment on the verdict, submitting his case and points without argument, and the defendant opposes the motion wholly upon the merits by submitting without argument, his points, in which no reference whatever is made to the exceptions taken upon the trial, the latter will be deemed to have waived his exceptions taken at the trial, and consented that the court might decide the motion upon the merits, irrespective of his exceptions. (*Id.*)
28. Upon a motion to dismiss the complaint, at the trial, the grounds should be stated, so that the supposed defect may be obviated by proof, at the time. (*Devoe* agt. *Brandt*, 58 *Barb.*, 493.)
29. In March, 1870, an action having been noticed for trial by both parties, judgment by default was granted in favor of the defendant. In April thereafter that default was opened upon terms which included setting the case down for trial for the fourth Monday of that month at special term.
- Held*, that the terms upon which the default was opened were discretionary; and that no point could be raised upon them against the regularity of the trial in April, unless the cause was in such a condition, as to issue, as not to

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- be triable. (*The Oneida National Bank of Utica* agt. *Stokes*, 58 *Barb.*, 508.)
30. Held, also, that if the cause was at issue, then, whether it had been noticed or not, would be wholly unimportant if the judge saw fit to include going to trial as one of the conditions of opening the default. (*Id.*)
31. Whether a cause can properly be brought to trial as against one defendant, when not at issue as to the others, where no previous order for a separate trial has been allowed by the court? *Quere.* (*Id.*)
32. A party by noticing a cause for trial, must be considered as admitting that it was at issue at that time, and is estopped by that act from objecting that issue was not joined. (*Id.*)
33. Until issue joined, a plaintiff has no right to notice the action for trial; and after having brought the defendants to court upon his (the plaintiff's) notice, the latter cannot be heard to say that they had been improperly brought there, if the defendants do not see fit to make the objection. (*Id.*)
- See APPEAL. (*Id.*)
REFEREE. (*Id.*)
34. Equity will entertain an action brought by the receiver of an insolvent corporation against its stockholders and creditors, to enforce the liability of the stockholders, as such, to the creditors, and to restrain the creditors from prosecuting the stockholders upon such liability. (*Calkins* agt. *Atkinson*, 2 *Lansing*, 12.)
35. So held upon the authority of *Storey* agt. *Furman* (25 *N. Y.*, 214). (*Id.*)
36. It seems a receiver's action to recover from stockholders their unpaid subscriptions to the stock of an insolvent corporation, must be brought against each stockholder separately. (*Id.*)
37. It seems one cannot try his title to the land by an action to recover possession of the harvested crop. (*Harris* agt. *Frink*, 2 *Lansing*, 35.)
38. A case for submission, under section 372 of the Code, must present an actual controversy for adjudication between the parties, and also indicate the judgment desired or it will be dismissed. (*Williams* agt. *City of Rochester*, 2 *Lansing*, 169.)
39. When a specific exception is taken to an erroneous conclusion of law, founded upon a clear and indisputable fact found by the referee, and on which alone he bases his erroneous conclusion, the appeal must be determined on the exception, and the court will not review the evidence nor presume other facts to have been found by the referee, in order to sustain the judgment. (*Armstrong* agt. *Bicknell*, 2 *Lansing*, 216.)
40. Where the possession and withholding of personal property, obtained through an execution sale thereof, constituted the unlawful taking and conversion in an action therefor, and the summons was delivered for service by a justice of the peace to a person duly deputized by him, though not a regular constable, before the sale, and was served on the defendants immediately after :
Held, that the action was commenced before the cause of action accrued, and that it could not be sustained. (*Hodge* agt. *Adee*, 2 *Lansing*, 314.)
41. Neither section 430 nor section 432 of the Code, confers upon the attorney general the power to prosecute an action in the name of the people, against commissioners appointed under an act of the legislature, to restrain them from issuing, etc., town bonds, provided for by such act, without performance of the conditions precedent required thereby; nor has he such power at common law. (*People* agt. *Miner*, 2 *Lansing*, 396.)
42. After trial of an action by the court the successful party, unless by express direction or special agreement, is not required to submit a draft of the judgment, before entry thereof, to the adverse party, or have it settled upon notice. (*People* agt. *Church*, 2 *Lansing*, 459.)
43. *Semble*, That upon a motion to set aside, or modify a judgment, on the ground that no notice was given of its settlement, its entry, in some material particular, otherwise than in accordance with the findings of law or fact, must be pointed out. (*Id.*)
44. A motion to set aside a judgment is not the proper remedy for an omission to find a fact, supported by the evidence. (*Id.*)
45. *Semble*, That if the fact is established by uncontroverted evidence, the remedy is by appeal. (*Id.*)
46. And that when the evidence upon the fact is conflicting, the course is to deliver to the judge, when the case is presented for settlement, a request to find the desired facts and conclusions of law, and that exception lies for his refusal. (*Id.*)

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47. Where the decision after a trial by the court, provided for a decree, among other things, directing a delivery by the receiver appointed in the action, of the property in controversy, to certain of the defendants, and the decree had been entered pursuant to the decision.

Held, that assuming the judgment to be still incomplete, so that no appeal could be taken thereon, and that so much of the decree as directed such delivery was in the nature of an interlocutory order, an appeal would lie therefrom as such, and proceedings taken in pursuance of the same, could not be set aside on motion at Special Term. (*Id.*)

48. An order granted on affidavits showing a decision made in an action, but that judgment had not been entered thereon, and staying proceedings on "the decision," does not stay proceedings on the judgment, and if served after judgment entered, is *functus officio* when served. (*Id.*)

49. After the entry of judgment in an action by the people, declaring the rights of certain defendants to the exclusion of others, to hold and exercise the office of directors of a railroad corporation, vacating a receivership, and directing delivery of the property of the corporation to the directors declared to be entitled, it seems an order staying "all proceedings upon the judgment until the entry of an order on a motion to set aside the judgment," does not stay proceedings to obtain possession from the receiver of the keys of the corporation safe and property. (*Id.*)

50. An order granted upon order to show cause after service of such stay of proceedings, no steps having been taken under it, will not be set aside upon a general motion to set aside the judgment and proceedings taken thereupon. (*Id.*)

51. Nor does an appeal and undertaking thereon stay such proceedings. (*Id.*)

52. And it seems, in such a case, when the judgment is entered upon the direction of a single judge, in order to stay proceedings on the judgment, as to so much thereof at least as respects the delivery and taking possession of the property ordered to be delivered, security must be given as provided in sections 336 and 338 of the Code (*Id.*)

53. Nor would the court, as grounds for setting aside the proceedings, taken in the exercise of legal rights, inquire in

to the motives of the parties taking them. (*Id.*)

54. It is not irregular for the judge, before whom a trial is had, to furnish the successful party with his findings before they are filed or to permit the attorney for such party to draw up the proposed findings. (*Id.*)

55. The practice in this respect stated and approved per TALCOTT, J. (*Id.*)

56. A certificate and certain affidavits used on the motion below, held to be irrelevant, and the affidavits scandalous, having been stricken out of the motion papers by the order appealed from.

Held, that the order in this respect should be affirmed. (*Id.*)

See APPEAL (*Id.*)

CONTEMPT. (*Id.*)

CORPORATION. (*Id.*)

EXECUTORS AND ADMINISTRATORS. (*Id.*)

GENERAL TERM. (*Id.*)

INDICTMENT. (*Id.*)

INSOLVENT DEBTOR. (*Id.*)

JOINT AND SEVERAL DEBTORS. (*Id.*)

JURY AND JURY TRIAL. (*Id.*)

OFFER TO COMPROMISE. (*Id.*)

PARTNERSHIP. (*Id.*)

SURROGATE AND SURROGATE'S ORDER. (*Id.*)

VERDICT. (*Id.*)

PREMIUM NOTE.

1. The charter of a mutual insurance company provided that upon alienation of property insured, the policy should be void and surrendered for cancellation and the assured entitled, upon his surrender and payment of his proportion of the losses incurred prior thereto, to his premium note, but that the alienee might have the policy, if assigned to him, ratified for his benefit, on giving security for the sum remaining unpaid upon such note, and thereupon should be entitled to the privileges, and subject to all the liabilities of the party originally owning the policy; the defendant who held a policy for which he had given his premium note, to be paid in sums and at times as required under the charter and by-laws of the company, by the directors, conveyed the insured property, and with the company's assent, assigned the policy to his grantees, and it was then by like assent reassigned to the defendant as collateral security for a debt due him from the grantee, who had also given a note

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in like terms with that of the defendant to the company; the company also retained the defendant's note, and the latter paid assessments upon it for losses, happening after the assignments of the policy. In an action by a receiver of the company against the defendant on his note.

Held, that the defendant was not liable thereon, and the plaintiff could not recover. (*Miner* agt. *Judson*, 2 *Lansing*, 300.)

PRESENCE OF PRISONER.

1. All instructions or information given by the court to the jury, having a tendency to influence the verdict, are a part of the trial, within the provision of the statute, (2 R. S., 759, § 13,) that no person indicted for felony can be tried, unless he be personally present during such trial. (*Maurer* agt. *The People*, 43 *N. Y.*, 1.)

2. Accordingly, where the plaintiff in error having been indicted, and being on his trial for murder, after the jury had retired to deliberate upon their verdict, they returned into court and asked certain questions of the court as to what had been the evidence on particular points, to which the court replied, giving the information requested:

Held, that this was a proceeding upon the trial within the statute, and the prisoner not having been present it was error, for which his conviction must be reversed:

Held, further, that neither the presence of the prisoner's counsel, nor his omission to object, could waive the illegality. (*Id.*)

PRESUMPTIONS AND PRESUMPTIVE EVIDENCE.

See BURDEN OF PROOF. (43 *N. Y.*)
BURGLARY. (*Id.*)
EVIDENCE. (*Id.*)
TAXES. (*Id.*)
ASSIGNMENT OF MORTGAGE. (2 *Lansing*.)
EVIDENCE. (*Id.*)
POWER AND AUTHORITY. (*Id.*)
PRACTICE. (*Id.*)

PRINCIPAL AND AGENT.

1. It is a general principle pervading the law of agency that one who procures services to be done for another, is not

himself chargeable as the debtor, unless he omits to make known his principal, or erroneously supposes that he has authority, or exceeds his authority, or expressly or impliedly engages to be answerable, either by directly promising to pay for them, if rendered, or by doing or saying something which ustifies the person who is to perform them, in supposing that the one who applies to him engages to pay for them.* (*Back* agt. *Amidon*, ante, 370.)

2. This principle applied in the present case, where the defendant took a telegram to the plaintiff—a surgeon in the city of New York, from the family physician of the defendant's brother in Connecticut, who had, in pursuance of such telegram, a surgical operation performed by the plaintiff, and the defendant, also a resident of the city of New York, went with the plaintiff to Connecticut, and paid the plaintiff's railroad fares, but as appeared from the evidence, said nor did nothing beyond the duties of an agent that would make him liable for the services performed by the plaintiff for his brother. (*Id.*)

3. Where a sale was made by the treasurer of a corporation, not authorized by its by-laws to make such sale, but who was proved to have been in the habit of doing such business with the knowledge and sanction of the company, and to have been in fact its sole managing agent:

Held, that the title passed by such sale. (*Phillips* agt. *Campbell*, 43 *N. Y.*, 271.)

See LIFE INSURANCE. (43 *N. Y.*)

MISTAKE OF FACT. (*Id.*)

RESCISSION. (*Id.*)

RELIGIOUS CORPORATIONS. (*Id.*)

4. It is a well settled rule of equity jurisprudence that all gifts, contracts or benefits from a principal to one occupying a fiduciary or confidential relation to him are constructively fraudulent and void. (*Comstock* agt. *Comstock*, 57 *Barb.*, 453.)

5. The court, in such cases, acts upon the principal that if confidence is reposed it must be faithfully acted upon; if influence is acquired it must be kept free from the taint of selfish interest, and conniving and overreaching bargains. (*Id.*)

6. It is for the common security of all mankind that the gifts procured by agents, and purchases made by them, from their principals, should be scrutinized with a close and vigilant suspicion. So of notes, bills, contracts, releases and obligations. (*Id.*)

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7. Agents are not permitted to deal with their principals, in any case, except upon showing the most entire good faith, a full disclosure of all the facts and circumstances attending the transaction, and an absence of all undue influence or imposition. (*Id.*)
8. Transactions which would be held unobjectionable between other parties are often declared void, if between persons occupying confidential relations. (*Id.*)
9. Where the relation of principal and agent existed between the parties to a note, receipt and contract, strengthened by the further and other relation of parent and child; and the parent, who was alleged to have executed the papers, was old and feeble, being at least seventy-seven years of age when the first bore date, and living with her son, the other party to instruments which were in his handwriting, and for his benefit; no object, benefit or advantage to her appearing; and there were other suspicious circumstances; and the party claiming under the instruments, merely proved the signature of the other party thereto, without offering any evidence of the facts and circumstances under which they were made; of their consideration, object and purpose; of their freedom from undue influence or imposition; or of good faith:

Held, that without assuming the existence of actual fraud, the claimant occupying a confidential relation to the other party, as her agent, at the time the instruments purported to be executed, they were, because of that relation presumptively fraudulent and void, as to her, or her representatives; which presumption could only be overcome by actual proof. (*Id.*)

See INSURANCE, (FIRE.) (*Id.*)
10. An agent, having received money for the use of his principal, is bound to pay it over to him, and has no right to return it to the person from whom he received it. (*Hancock* agt. *Gomez*, 58 *Barb.*, 490.)
11. He cannot dispute the title of his principal, by setting up an adverse title in a stranger. (*Id.*)
12. Where agents abroad are vested with a discretion, both as to quality and price, in making purchases of teas and silks, for their principals in this country, they are not liable for a failure to purchase, without more proof than the mere fact that some purchases were made, during the time, by other dealers, within the limit. (*Heinemann* agt. *Heard*, 58 *Barb.*, 524.)
13. Under such instructions, it should appear that the agents not only could have purchased, but that knowledge of the opportunities of making the purchases was brought home to them, and that their omission to purchase was wilful, and not the result of an ordinary degree of discretion and prudence on their part. (*Id.*)
14. One not authorized to make a sale of property, by its owner, but simply to advertise it for sale and procure some person to negotiate with the owner, cannot make a representation or warranty respecting it which will be binding upon the owner, without his authority or knowledge. (*Lansing* agt. *Cole*, 58 *Barb.*, 611.)
15. Such an agent is not clothed with any real or apparent authority to make any representations on the subject. (*Id.*)
16. The defendant, having an interest in a manufacturing copartnership which he wished to sell, requested R. to procure a purchaser for the same, agreeing, in case he did so, to give him a certain portion of the purchase money, if a purchaser at a certain price was found. There was no evidence of any representations made by the defendant to R. or of any express authority to R. to make any representations or statements respecting the property; and no proof of any knowledge on the part of the defendant that any representations or statements had been made by R.; nor was there any authority given to R. to make a sale of the property:

Held, that representations made by R. to the plaintiffs, prior to a negotiation between the latter and the defendant, for the purchase and sale of the property, were not admissible in evidence against the defendant: (*Id.*)

Held, also, that the case was within the principle laid down in *Smith* agt. *Tracy*, (36 *N. Y.*, 79.) (*Id.*)

Held, further, that proof of such representations could not be deemed immaterial, inasmuch as the defendant himself was proved to have made the same representations, at the time of the sale; because the court could not see that the jury might not have based their verdict, to some extent, on the representations claimed to have been made by R. (*Id.*)
19. An association carrying on the manufacture and sale of cheese, and owning a factory and machinery suitable for its business, made, through its man-

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aging committee, a year's lease of the same to C, agreeing to provide him utensils and conveniences, in good order, for the manufacture of cheese; C thereupon agreed to pay \$600 rent and taxes of the premises, manufacture into cheese in a skillful and workmanlike manner, the milk (restricted to the produce of 800 cows) furnished the factory; provide materials for use in the manufacture; box and prepare the cheese for market, half according to a size named, the rest according to hoops to be provided by the committee; insure them while remaining at the factory, and delivered them thereat as the committee should direct. It was a further part of the agreement, that each "patron," or person supplying milk, should have a proportionate part of the whey, either fed to his stock, at so much per head, on the premises, or delivered to him thereat, and that C should account for half the proceeds of surplus whey sold by him; that C should keep accounts, make a statement of each sale of the cheese, exhibiting the proportionate amount due to each patron from such sale, on account of milk furnished by him after deducting the price of manufacture and charges for keeping and feeding stock; pay the rent agreed to the committee, by deductions from the proceeds of sales in proportionate sums, as due thereat respectively, omitting the two first sales; give the business all necessary personal attention; not under let it, and at the expiration of his lease surrender in good order, etc. The committee agreed that the patrons should furnish C one good rennet for the milk of each cow, and pay him a percentage upon each one hundred pounds of cheese sold and delivered. C entered into the premises and manufactured cheese, some of which was sold to the plaintiff as good merchantable cheese, on behalf of the association by the defendants, who, with one P, constituted the committee, and who were also patrons of the association and interested as such in the sale. The cheese so sold had been fraudulently manufactured of sour curd by C and his employees and was of bad quality on that account. In an action to recover damages for fraud in the sale:

Held, that the defendants were liable for the fraud of C and his employees and servants, on the ground of their agency for the defendants in manufacturing the cheese, and although the defendants might in fact, have been ignorant thereof. (*Durst* agt. *Burton*, 2 *Lansing*, 137.)

See COMMON CARRIER. (*Id.*)
DEFENSES. (*Id.*)
DELIVERY. (*Id.*)
MASTER AND SERVANT. (*Id.*)

PRINCIPAL AND SURETY

See AGREEMENT. (58 *Barb.*)
MORTGAGE OF LAND. (2 *Lansing*.)
PARTNERSHIP. (*Id.*)

PROMISE.

See AGREEMENT. (57 *Barb.*)
PARTNERSHIP. (*Id.*)

PROMISSORY NOTES.

1. A waiver, by the indorser of negotiable paper, of demand upon the maker, and of notice of nonpayment may be by implication from his acts, as well as by express words. (*Sheldon* agt. *Horton*, 43 *N. Y.*, 93.)
2. And accordingly, where the holder of a promissory note, just previous to its maturity having sought an interview with the indorser, shown him the note, and stated that "the maker wanted it to remain another year," asked him if he was willing:

Held, that the reply of the indorser that he was willing to let it remain, and that it was a good note, were a waiver of demand and notice at maturity, and their omission did not discharge the indorser:

Held, further, that under these circumstances, the waiver was complete, independently of the question whether an agreement between the maker and holder for an extension for one year on the note was or was not made and in such case, the liability of the indorser becomes, by the waiver, absolute on the maturity of the note, and no subsequent demand and notice, at the expiration of the year of extension, or at any other time, are necessary to fix him. (*Id.*)

See BURDEN OF PROOF. (*Id.*)

3. As to the payee of a note, no notice of the want or failure of the consideration is necessary to constitute it a defense. (*Saxon* agt. *Dodge*, 57 *Barb.* 81.)
4. Where several payees of a promissory note unite in indorsing the same to one of their number, the latter acquires the interest only of his associate payees, in the note, and is not entitled to protection as a purchaser for value. (*Id.*)

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5. And if, in an action brought by him upon the note, the answer sets up a total want of consideration for the note, in matter and manner sufficient to defeat the act on, had it been brought in the name of the payees, it is not necessary to allege notice to, or knowledge in, the plaintiff, of the entire worthlessness of the consideration. (*Id.*)
 6. Where all the other joint payees of a note transfer their interest to one of their number, and the action is brought by him, he stands upon the same footing, in respect to notice, that he did before. It is not in the power of several joint payees of a note to escape a just defense to it by such a contrivance. (*Id.*)
 7. If the payee of a note indorses it to himself, he does not in any respect change his position. An action upon it may be defended, as against him, upon the same principle after the indorsement as before. (*Id.*)
 8. He does not stand upon the footing of a *bona fide* indorsee and holder in the usual course of business, the same as though he had not been one of the original payees. (*Id.*)
 9. Parties claiming to have a patent, which gave them the exclusive right to make and vend certain reapers and mowers, gave a license to the defendants to make and vend such reapers and mowers, and also to sell territory, for a specified consideration, called license fees, which the defendants agreed to pay. They subsequently gave a note for those fees. In an action brought thereon, by an indorsee, the defense was that the patent was void and conferred no exclusive right whatever upon the payees of the note, and that there was therefore a want of consideration therefor:
- Held*, 1. That so far as the question of estoppel was concerned, the case stood upon the same footing as it would have done had the action been to recover the license fees. 2. That the defendants might set up a want of consideration for the note, as a defense to the action. (*Id.*)
10. In an action upon a promissory note given for the purchase money of a patent right, where the defense is a total want of consideration, the inquiry into the validity of the patent, or of the license to sell under it, comes in collaterally only by way of evidence. In such a case this court may inquire into the validity of the patent as well as anything else, for the purpose of determining the question of consideration. (*Id.*)
 11. The true test, in all such cases, is whether the judgment upon the issue, allowing the court to have jurisdiction, would affect or determine the right claimed under the patent. (*Id.*)
 12. An answer, in such an action, alleging, generally, that the plaintiff made the false representations knowing them to be so, but not alleging that the defendants relied upon such statements, and entered into the contract supposing and believing them to be true, does not state facts sufficient to constitute the defense of fraud. (*Id.*)
 13. Where several payees of a promissory note unite in indorsing the same to one of their number and another person, the indorsees stand in the same situation, precisely, in respect to the defense of a want of consideration, that a payee does where the note is indorsed to him alone, by the other payees. (*Sutton et al. agt. Dodge, et al*, 57 Barb., 116.)
 14. And as, in the latter case, the note is open to the defense of a want of consideration without alleging notice of such want to him, so another person by becoming a holder jointly with the payee, or one of the payees, subjects himself to the same defense. (*Id.*)
 15. It will not do to allow a payee to get rid of a defense by transferring a share in his obligation to another. (*Id.*)
 16. By taking an interest or share only in the note he must be held to take subject to any defense which may lawfully be interposed against his co-indorsee. (*Id.*)
 17. In an action upon a promissory note, brought since the Code, the defendant has a right to prove that the plaintiff is not the real owner of the note sued on. (*Eaton agt. Alger*, 57 Barb., 179.)
 18. If the plaintiff is not a regular indorsee or holder, but holds the note merely as agent for the payee, against whom the defendants claim to have a good defense, they are interested in questioning the plaintiff's title and have the right to show his want of interest. (*Id.*)
 19. If the plaintiff is not the real party in interest, that, of itself, under section 111 of the Code, is a bar to all further proceedings in the action, and a complete defense, as against the plaintiff. (*Id.*)
- See PARTIES. (*Id.*)
STAMPS. (*Id.*)

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20. In an action upon a promissory note alleged by the defendants to have been given as the consideration for compounding a crime, it is not necessary, in order to render the note invalid, for them to prove that the maker, in terms, agreed to compound a crime. If it be apparent that such was the intention of the parties, and the agreement was such as to carry out the intent, that is enough. (*Vonderman agt. Trenchard*, 58 Barb., 165.)

21. It is not necessary, in order to render such a contract invalid, that the person receiving the consideration should agree not to commence new proceedings against the person accused. It is enough that he obligates himself to release the defendant from a pending prosecution. (*Id.*)

22. H. having been arrested upon a criminal warrant, on a charge punishable by imprisonment in a state prison, and being in actual confinement, awaiting examination, an arrangement was made between S., the person on whose complaint the arrest was made, and the defendants, by which the latter agreed to give their note to S. for the amount of his claim, constable's fees, and certain items owing by H. to other parties; and S. agreed that upon their so doing H. should be "released, so that he could go to work and earn enough to pay up the note." The note was given, accordingly, and thereupon H. was discharged, and no further proceedings were had, on the criminal complaint:

Held, that the proof showing that there was an agreement to terminate the criminal prosecution then pending, for a pecuniary consideration, and its termination in pursuance thereof, the whole proceedings were illegal and corrupt, and the promissory note given in performance of such agreement was void. (*Id.*)

23. An agreement between partners, for a dissolution of the firm, and for a transfer from one partner to the other of the assets of the firm, is a good consideration for promissory note, given by the latter for the purchase money. (*Springer agt. Dwyer*, 58 Barb., 189.)

24. The fact that the purchaser of the assets was induced to enter into the agreement by the false and fraudulent representations of the other partner, respecting the partnership assets, is no defense to an action upon the note by a bona fide holder, so long as the agreement stands, and the defendant retains the property transferred, without offer-

ing to reassign the same, or demanding a return of the note. (*Id.*)

25. Under such circumstances, however, the maker of the note may maintain an action against the payee, for the fraud; or, in an action upon the note, may set up the fraud as a counter-claim. (*Id.*)

26. Where the indorsee of a note produces it on the trial, it is to be presumed that he is the holder in good faith, and that he received it before maturity. If the defendant alleges the contrary, the burden of the proof is upon him. A mere denial of ownership, by the plaintiff, a few days after the note matures, will not conclude him, or rebut the presumption of ownership before maturity. (*Id.*)

27. In an action upon a promissory note, between the original parties to it, the consideration may be inquired into, on the trial; and it is subject to the equities existing between the parties. (*Divine agt. Divine*, 58 Barb., 264.)

28. A promissory note, given for a part of the consideration money of premises described in an executory agreement for the sale thereof, dated the same day, payable on the day of the delivery of the deed, and being a part of the same transaction, may be read and interpreted with the agreement, as a part of it, or as a waiver of its terms, to that extent. (*Id.*)

29. Such a note is a substitute for the payment of the sum agreed to be paid at the time fixed for the execution of the deed, and until paid, that part of the agreement is not performed. It is a collateral and simple promise to pay the same money mentioned in the written agreement. Its only real effect is to postpone the payment of the unpaid part of the purchase money until the day the deed is to be executed. (*Id.*)

30. And the purchaser having omitted to pay the sum specified in the agreement, at the time it became due, and an action therefor being brought by the vendor:

Held, that the plaintiff was bound to prove, on the trial, that before suit brought he had offered to comply with the agreement on his part; that is, that he had offered to convey the premises to the defendant on receiving the balance of the purchase price:

Held, also, that the payment of the purchase money, and the execution of the deed being dependent acts, and the plaintiff not having shown an offer to convey, he had failed to make out a

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cause of action, and should have been nonsuited. (*Id.*)

31. In such an action, parol evidence tending to show that the plaintiff not only abandoned the agreement on his part, but that there was a failure of the consideration of the note sued upon, in that the plaintiff had sold the land to another person, and that he had done acts that estopped him from prosecuting the defendant upon the note given for the unpaid purchase money is competent for that purpose; and is not open to the objection that it is intended to change or vary the terms of a sealed agreement. (*Id.*)

32. Neither the payee, nor any holder, of a promissory note given in part performance of a fraudulent bargain, who is not an innocent, *bona fide* holder for value, before it becomes due, can enforce its collection against the maker. If a note be given for the price of property purchased in fraud of the payee's creditors, the law will not aid in carrying out any portion of the fraudulent bargain upon which it was given, but will leave all the parties who are chargeable with notice, to rely upon the option of the maker for the performance of the apparent obligation. (*Briggs agt. Merrell, 38 Barb., 339.*)

33. A receiver does not stand in the situation of an innocent, *bona fide* holder for value. He acquires title by legal process, and not in the regular course of dealing in commercial paper. (*Id.*)

34. A note, being of no legal value, as against the maker, in the hands of a receiver, or a judgment creditor of the payees, the taking of it by such creditor, upon supplementary proceedings against the payees, for the purpose of having it applied to the satisfaction of his judgment, cannot operate in law as a ratification or sanction of the bargain upon which the note was given; or estop such creditor from insisting that the bargain was void as to him, by reason of the fraud in which it was conceived and carried out, and that the maker acquired no title to the property for the purchase money of which it was given, as against the claims of such creditor. (*Id.*)

35. A judgment creditor may take a promissory note given by a third person to his debtor, by virtue of his execution or proceedings supplementary, without thereby relinquishing his right to take the property of the debtor, for the purchase money of which the note was given. (*Id.*)

See AGREEMENT. (*Id.*)

PARTNERSHIP. (*Id.*)

BILLS OF EXCHANGE AND PROMISSORY NOTES. (2 *Lansing.*)

PROVISIONAL REMEDIES,

See ATTACHMENT. (57 *Barb.*)

PUBLICATION.

See WILL. (2 *Lansing.*)

PUBLIC ENEMY.

See BILL OF EXCHANGE. (43 *N. Y.*)
PARTNERSHIP. (*Id.*)

PUBLIC POLICY.

1. Where a contract for the performance of any public service or work is to be awarded to the bidder therefor offering terms most favorable to the public, any agreement between parties designing to make bids, tending either directly or indirectly, to restrain or lessen rivalry and competition between them is void as against public policy, even although it may not appear that such agreement did really produce any result detrimental to the public interest. (*Atcheson agt. Mallon, 43 N. Y., 147.*)

2. Accordingly, where a board of auditors of a town were, by statute, authorized to receive sealed proposals for the collection of the taxes to be assessed in the town, and to award the collection of the taxes to the person who shall propose to collect the same on terms most favorable to the town.

Held, that an agreement between two persons, each sending in distinct sealed proposals, that, if the collection should be awarded to either, both should share equally in the profits, if any, and contribute equally to the losses, was against public policy, and void. (*Id.*)

3. Where an illegal contract has been fully executed and money paid thereunder remains in the hands of a mere depositary, who holds the money for the use of one of the parties to the contract, an action brought to recover the money so held will be sustained. (*Woodworth agt. Bennett, 43 N. Y., 273.*)

4. Where, however, the recovery of the money requires the enforcement by the court of any of the unexecuted provisions of the illegal contract, no action can be maintained. (*Id.*)

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5. A third person who receives money from one party to be paid to another (which payment could not have been enforced between the two parties on account of the illegality of the transaction between them), cannot interpose such illegality as a defense to an action brought against him to enforce payment. (*Id.*)

6. Accordingly, where four, one a State engineer, entered into an agreement by which one of them was to bid for certain public work, and all, to be jointly interested in the bid, and before the work was awarded they agreed to and did withdraw their claim to the work, and sold their bid for four hundred dollars to a party who was a higher bidder for the same work, the purchaser giving his note for the amount, which was left with one of the four, with the understanding that, when paid, each of said persons should receive \$100, the note being subsequently paid to the party holding it.

Held, in an action brought by him against one of the parties to this agreement for goods sold, etc., that the \$100 dollars retained by him from the proceeds of said note was not a good subject of counter-claim, it being necessary, in order to sustain such claim, to enforce a partnership or joint agreement entered into for the attainment of objects illegal and contrary to the statutes of the state (*Sess. Laws*, 1854, chap. 329), which requires that any proposal for work shall contain the names of all parties interested therein, and prohibits any secret arrangement that any person not named, or any engineer in the employ of the state, shall be interested therein, etc. (*Id.*)

7. The creditors (the plaintiffs), for whose benefit an assignment in trust of a chattel mortgage has been made, may lawfully agree with the assignee (the defendants' intestate) that, at the sale at auction under the mortgage of the property covered thereby, he should bid the same in, and if any of such creditors should bid off any of the articles sold, the assignee should assume their bids, and hold all the property so purchased, and apply it to the payment of the debts. (*Bradley* agt. *Kingsley*, 43 N. Y., 534.)

8. Such an arrangement is not against public policy as tending to prevent competition at a public sale, and where the defendant's intestate having made such an arrangement, bought in all the property and failed to account for its value to the creditors, his representa-

tives were held liable to such accounting. (*Id.*)

See **BILLS OF EXCHANGE.** (*Id.*)
PARTNERSHIP. (*Id.*)
CONSPIRACY. (2 *Lansing.*)

Q.

QUESTION OF FACT

See **EVIDENCE.** (2 *Lansing.*)

QUESTIONS OF LAW AND FACT.

See **FINDINGS OF FACT AND CONCLUSIONS OF LAW.** (43 N. Y.)

R.

RAILROADS.

1. A receiver when appointed of the property of a corporation, displaces the directors or other body that by its charter are authorized to manage its affairs, and under the direction of the court by whom he is appointed, has the sole control of its property and effects; and when authorized so to do, the exclusive power to use its franchises. (*City of Rochester* agt. *Bronson*, ante, 78.)

2. Such an appointment ought not to be made, unless in a case of necessity to protect the stockholders or creditors from loss, or to prevent an abuse of the corporate franchises. (*Id.*)

3. The stockholders are entitled to have the selection of the agents who are to manage the affairs of the corporation, and this power ought not to be taken from them unless it is necessary for their own protection, or that of creditors, or the state. (*Id.*)

4. The act of 1870, (*ch.*, 151,) assumes to enumerate the cases in which receivers of corporations may be appointed, and to prescribe the length of notice which must be given of the application for such appointment; and in the most emphatic terms forbids the appointment, unless in the cases expressly enumerated by it. (*Id.*)

5. A construction which would tolerate a receivership at the discretion of the court, because it is proposed to extend it to but a part of the corporate property, would annul the statute, and increase instead of lessen the abuses

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- which the act of 1870, was intended to remedy or prevent. (*Id.*)
6. The plaintiff owns a majority of the stock of the Rochester and Genesee Valley Railroad, and under the act of 1851, was entitled to appoint four of the thirteen directors of that corporation. In 1867, the act of 1851, was amended so as to empower the plaintiff to choose seven instead of four of the said directors. A part of the stockholders, insisting that the act of 1867 was in violation of the constitution, treated it as of no force and proceeded to elect directors under the act of 1851. The other stockholders elected a board of directors under the act of 1867; and the plaintiff proceeded under the latter act to appoint seven of the thirteen directors. (*Id.*)
 7. Both boards claiming to act, each as the legally constituted board, suits were instituted to determine the right of the board elected under the act of 1851, to act for the company. And it was held by the general term in the 7th district, that the act of 1867 was constitutional and valid, and that the persons elected pursuant to its provisions constituted the board of directors of said railroad company. Since the commencement of this action, the judgment of the general term has been affirmed by the court of appeals *pro forma*, that an appeal may be taken to the supreme court of the United States. (*Id.*)
 8. In 1858, the Rochester and Genesee Valley R.R. Co., leased its road to the Buffalo, N. Y. and Erie R.R. Co., for ten years with the privilege to the lessee to extend the term ten years longer—the rent for the use of the road was 48 per cent. of the gross earnings of the company, payable on or before the 25th day of each month succeeding the month in which the earnings accrued. The lessee, in 1863, assigned this lease to the Erie R.R. Co., who assumed to fulfill the conditions of the lease on the part of the lessee. (*Id.*)
 9. This action is brought to recover a balance of rent claimed to be due to the plaintiff under the aforesaid lease, and for the appointment of a receiver of the property and effects of the Rochester and Genesee Valley R.R. Co., alleging the insolvency of the Erie R.R. Co., the present lessee of said former road, &c.:
- Held*, that the insolvency of the Erie Company, to say the least, is as positively denied by the president of the company as it is affirmed in the complaint, and so far, therefore, as insolvency formed a ground for the receiver's appointment it was removed:
- Held* also, that so far as the resistance of the Erie Company to the action brought to recover the rent is concerned, of the resistance by the directors who have been held not to be duly elected by the decisions of the courts against them, they furnish no ground for the appointment of a receiver. It is the right of every party to a litigation to appeal from adjudications against him. (*Id.*)
10. Defenses are embarrassing to a plaintiff who is endeavoring to enforce an honest claim, but the right to put them in must be defended notwithstanding they may be put in occasionally, in bad faith. There are other and less mischievous remedies for such abuses than the appointment of receivers. (*Id.*)
 11. Where the plaintiff brought her action against the defendants—a city railroad company—for damages alleged to have been caused by serious injuries received by her, through the negligence and carelessness of the defendants' servants, in starting the car on a return trip before she could get off, by reason whereof she was thrown upon the paved street—her leg broken and other injuries received.
- Held*, by the general term on appeal by the defendants, that the evidence given upon the trial was sufficient, not only to establish the fact that the plaintiff was not thrown from the car by the starting of the horses, but that she must have jumped, or stepped off, by her own volition, after the car was in motion. (*Dickson* agt. *Broadway & Seventh Ave. R.R. Co.*, ante, 151.)
12. The plaintiff having failed to prove upon the trial that the injuries of which she complained, were caused by the starting of the horses, the judgment rendered in her favor was reversed and a new trial ordered, costs to abide event. (*Id.*)
 13. Where the directors of a railroad company are sued individually, a receiver cannot be appointed to take charge of the affairs of the road; nor can one of two *cestui que trusts* be sued without the joining of the *cestui que trusts*. (*Groesbeck* agt. *Duncomb*, ante, 302.)
 14. Upon the application of a railroad company to appropriate lands by the exercise of the right of eminent domain, delegated to it under the general railroad acts, it is for the court to decide as to the necessity and extent of such appropriation, and the determina-

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tion of the board of directors of such company is not conclusive upon that question. (*Rensselaer & Saratoga Co. agt. Davis*, 43 N. Y., 137.)

15. The acquisition of lands for speculation or sale, or to prevent interference by competing lines or methods of transportation, or in aid of collateral enterprises, remotely connected with the running or operating of the road although they may increase its revenues and business, are not such purposes as authorize the condemnation of private property therefor. (*Id.*)

16. Accordingly, where a railroad company having one of the termini of its road upon a navigable water-way extending into the territory of a foreign power, in its application for the acquisition of certain lands situate on the shore of such water-way near the said terminus, alleges, as a prominent reason for their condemnation, that a charter had been granted by such foreign government for the construction of a ship canal connecting the said water-way with other navigable water which, when completed, would greatly increase the business of the railroad, and that the lands were needed for the construction of slips and docks for the accommodation of vessels bringing freight to or taking it from the said road and of tenements for the employees of the railroad, and to meet the requirements of the anticipated increased business, and it appeared from the proofs that the company already had at such terminus, a convenient and accessible water-front and docks, which were used but in part, and were capable of extension on its own premises, and it did not appear that the work on the ship canal referred to had been commenced, or that the capital to construct it had been secured.

Held, that it was not sufficiently shown that the lands were required for the present or prospective business of the corporation within the meaning of the statute, and they could not be taken against the will of the owner. (*Id.*)

17. The taking of private property for public uses is in derogation of private right, and in hostility to the ordinary control of the citizen over his estate, and statutes authorizing its condemnation are not to be extended by inference or implication. (*Id.*)

18. Trustees of a railroad mortgage given to secure the bonds of the company, who proceed to foreclose the mortgage for the benefit of the bondholders, and who, being directed in the decree of

foreclosure to bid off the road at the foreclosure sale at a certain sum, if no equal bid is made by others, do accordingly make the bid, receive a deed from a referee, and operate such railroad for the benefit of their *cestuis que trust*, must, as to the public, be regarded as operating the road as owners, and render themselves liable as common carriers of all goods transported over the road under their management. (*Rogers agt. Wheeler*, 43 N. Y., 598.)

19. They are in no sense receivers, or officers of the court, entitled to the immunities from the ordinary liabilities of persons conducting such business, if any, belonging to such officers. (*Id.*)

See NEGLIGENCE. (Id.)

20. On a question whether an action can be maintained or not against the officers of a railroad company, to compel them to account for their official conduct, in the management and disposition of its funds and property, and upon allegations of abuse of trust and gross misconduct, to obtain their suspension and removal from office, if the plaintiff stands in the relation to the defendants, of a creditor or stockholder of the company, authorizing him to bring the suit, the court has no right to look into his motive in bringing it. (*Ramsey agt. Gould*, 57 Barb., 398.)

21. And although in moving such action the plaintiff's malice is gratified, or his independent litigations incidently subserved, still, unless the court can plainly see that he has no meritorious cause of action, or that he is estopped from prosecuting it, his prosecution of it will not be deemed a perversion or abuse of the process of the court. This is equally true in a court of equity, as in a court of law. (*Id.*)

22. The inquiry in each court must be with reference to the plaintiff's right of action, and whether in it are involved interests entitled to the protection of the court, and not to his ulterior motives and purposes in bringing the suit. (*Id.*)

23. If, in an action against the officers of a railway company, to compel them to account for their official conduct and to obtain their suspension and removal from office, on the ground of misconduct and abuse of trust, the plaintiff is, in fact, the owner of bonds and stock of the company, he is *personally* interested in obtaining the relief sought by him; and this being so, the

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court, in inquiring whether the action is prosecuted for the purpose of obtaining that relief, or for the mere abstract purpose of "bringing men to justice," must look to the cause of action shown, and the judgment demanded in the complaint, rather than to motives or purposes elsewhere avowed or shown to exist. (*Id.*)

24. In such an action the plaintiff has no inequitable advantage which he is seeking to enforce against the defendants. His buying the stock and bonds of the company was no wrong done them, with whatever intent it was done. The relative rights of the parties are the same as if the suit were brought by the plaintiff's vendor. The intent with which he purchased does not change or affect those rights, or raise any equities respecting them, in favor of the defendants. In regard to them his hands are "clean," and the rule of equity requires no more. (*Id.*)

25. His bringing the suit, after having become invested with the bonds and stock, is not *bad faith*, such as the courts will relieve against. (*Id.*)

26. There are no cases where the courts have perpetually stayed proceedings as being against *good faith*, except where the suits were brought in violation of some arrangement or understanding between the parties. (*Id.*)

27. If the plaintiff can, as a stockholder, bring the officers of a corporation into court, for any portion of the relief demanded in the complaint, the case cannot be summarily disposed of by a dismissal of the complaint, or an order perpetually staying proceedings in the action. (*Id.*)

28. Where the plaintiff brings the action on his own behalf and on behalf of all others having a common interest, and he alleges that the officers named as defendants control the company, he may, as a *stockholder*, maintain the action for such portion of the relief demanded as does not depend upon the authority of the statute relative to "proceedings against corporations in equity," although he be not a *creditor* of the company. (*Id.*)

29. The defendant was running a railroad belonging to another corporation, and using it for the ordinary purposes of a railroad, for its own benefit, under and by virtue of a written agreement with the owners, and for a period of time only fixed by the terms of a lease made to another corporation, and assigned to the defendant, who agreed to pay the rent reserved in said lease.

Held, that the defendant was a *lessee* of such road, within the meaning and intent of the general railroad act of 1850, and the act of 1864, amending the same and extending its provisions to the *lessees* of any railroad. And that as such lessee, it was liable for the value of a cow killed by its engine upon the track, in consequence of the defendant's neglect to maintain fences and cattle guards as required by the statute. (*Burchfield* agt. *Northern Central R.R. Co.*, 57 *Barb.*, 589.)

30. The term *lessees*, in the statute, is to have such a construction as was intended by the legislature to meet the then known and existing condition of things; to meet the case of parties using a road, as the substitute for the owners, and exercising the rights of owners, under some right or permission, for a consideration to be paid to the owners. (*Id.*)

31. In an action to recover damages for a personal injury occasioned by negligence, if the facts proved establish negligence on the part of the defendant, the court should not order a nonsuit unless the conduct of the plaintiff was, *per se*, negligence contributing to the injury. (*Phillips* agt. *Rensselaer and Saratoga Railroad Co.*, 57 *Barb.*, 644.)

32. It is the duty of a passenger who intends taking the cars upon a railroad, to use reasonable diligence in inquiring as to the time and manner of entering and taking his seat therein. But if the railroad company has made no rules and regulations on that subject; or, if made, has given them no publicity by signs, card-boards or other notices, as to a particular station at which they receive and discharge passengers; then the case is left to be settled by the common law duties and obligations of the railroad corporation, and the rights of the passenger who has purchased a ticket, and is entitled to be carried therefore; in the cars. (*Id.*)

33. In such a case the passenger is left to find out, as best he can, as to the time, place, and time, at which he may enter the cars; and he is justified in relying upon his observation of the custom of the company on prior occasions, as to the time, place and manner of receiving and discharging passengers at the same place, and may assume such to be the rules and regulations of the company, in that respect, and act upon that assumption, provided he acts with such prudence and care as a reasonable man is bound to exercise. (*Id.*)

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34. Where there was an absence of any passenger platform, to indicate the proper place for passengers to enter the cars; and though there was a narrow plank walk on the east side of the track, it was the custom of the railroad company to receive and discharge passengers on both sides; and the plaintiff himself on former occasions, had been received and discharged on the east side of the track, as had other passengers, all along, for a distance of over 200 feet:

Held, that the company having permitted, if they had not actually adopted, this method of receiving passengers at the station in question, they must be regarded as responsible for the safety of the regulation. That it amounted to an invitation, at least to those who had been thus received and discharged, to enter the cars upon either side of the track. (*Id.*)

35. Although ordinarily, the conceded fact that a passenger attempting to get upon a train while it is in motion, is, *per se*, such an act of negligence on his part as to bar a recovery for injuries sustained, yet this is not an invariable rule. What is common or ordinary neglect, is much more matter of fact than of law. And in such a case, where the negligence of the plaintiff is claimed to have contributed to the injury all the facts and circumstances constituting negligence, or those that are proper to be considered, should be left to the jury. (*Id.*)

36. Where the plaintiff offered to prove that before the time of the injury sued for, he had got on and off the cars, at that place, when they stopped no more than they did at the time in question; and that he had knowledge that they frequently did not stop, any more than to slow down, as they did at this time.

Held, that the judge erred in rejecting the evidence offered, and directing a nonsuit. That he should have submitted the testimony to the jury upon a proper charge as to the law. (*Id.*)

See ADIRONDACK COMPANY. (*Id.*)
BOND. (*Id.*)
MUNICIPAL CORPORATIONS. (*Id.*)
TOWNS. (*Id.*)
ASSESSMENT (2 *Lansing*.)
COMMON CARRIER. (*Id.*)
MASTER AND SERVANT. (*Id.*)

RAPE.

1. On the trial of a prisoner upon an indictment for an assault and battery with the intent to commit a rape, if the

evidence is clearly insufficient to warrant or justify a conviction for that offense, an exception to the refusal of the court so to rule, or charge, is well taken the same as though it had been a civil action:

Held, that this case was entirely bare of any and all evidence to prove an intent to commit a rape. Taking the testimony of the girl herself, in its fullest length and breadth, it was no clear, beyond doubt, that even a simple assault and battery was committed (*Reynolds* agt. *The People*, ante, 179.)

2. It is quite certain, however, that had the prisoner had sexual intercourse with her at the time, with no more resistance on her part than appears from her testimony, he could not justly have been convicted of a rape, within the rule established in the *People* agt. *Morrison*, (1 *Park. Cr. R.*, 625,) and the *People* agt. *Abbott*, (19 *Wend.*, 192.) At most the testimony would have made but a "mixed case," and her *quasi* assent would have been presumed from such mere passive resistance. (*Id.*)
3. Where the indisputable evidence in such a case, is such as to raise only a suspicion or conjecture of the criminal intent, it is clearly insufficient, and the court should so charge the jury. (*Id.*)
4. Where the court under the evidence, submit to the jury the felonious intent to commit a rape, (together with the crime of assault and battery,) against the prisoner's objection and exception, and the jury find a verdict against the prisoner for simple assault and battery, it is error for which the judgment will be set aside and a new trial ordered. It was calculated to, and the presumption is that it did prejudice the prisoner's defense on the other branch of the case. (*Id.*)

RATIFICATION.

See PRINCIPAL AND AGENT. (43 *N. Y.*)
INFANCY. (*Id.*)
BILLS OF EXCHANGE AND PROMISSORY NOTES. (2 *Lansing*.)
LIMITATIONS, STATUTE OF. (*Id.*)

REAL ESTATE.

1. An instrument in writing by which a lessee for lives, of land, assumes, with the assent of the lessor, to convey to a purchaser all the wood and timber thereon, with authority to the purchaser, at any time thereafter, to enter upon the premises and take off the same, covers such an interest in land

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as constitutes a freehold estate. (*Good-year* agt. *Vosburgh*, 57 *Barb.*, 243.)

2. No writing less than a deed legally executed is sufficient to divest the grantor of such an estate. (*Id.*)
3. If the instrument by which it is attempted to be conveyed is not attested by at least one witness, it will not take effect, as against a purchaser or incumbrancer until it is properly acknowledged by the grantor. (*Id.*)

See **STANDING TREES.** (*Id.*)
ASSESSMENT. (2 *Lansing.*)

RECEIPT.

See **PRINCIPAL AND AGENT.** (57 *Barb.*)

RECEIVER.

1. Where the plaintiff, a foreign corporation, brought an action against one of its stockholders to recover an installment due on stock, subscribed for by him, and the only defense relied on was that a creditor of the plaintiff had obtained a judgment against it; and on proceedings supplementary to the execution thereon, an order had been made restraining the defendant from paying the debt, a receiver had been appointed and had duly qualified in such proceedings, though no demand was ever made by such receiver upon the defendant for the said debt:

Held, that plaintiff was entitled to recover, and that the defendant could have taken the order of the court directing the payment by him of the amount of the debt which would have protected him in such payment. (*Glenville Woolen Co.* agt. *Ripley*, 43 *N. Y.*, 206.)

See **FORECLOSURE.** (*Id.*)
FOREIGN CORPORATIONS. (57 *Barb.*)
PARTNERSHIP. (*Id.*)
DEBTOR AND CREDITOR. (58 *Barb.*)
PROMISSORY NOTES. (*Id.*)
PRACTICE. (2 *Lansing.*)
COMMON CARRIERS. (*Id.*)

RECORDING ACTS.

1. The assignee of a mortgage is a purchaser of "real estate," within intent of section 1 of the recording act (1 *R. S.*, 756); and the assignment being made in good faith, and for a valuable consideration, he is protected by the record thereof against a release subsequently made by his assignor. (*Belden* agt. *Meeker*, 2 *Lansing*, 471.)

2. The principles of the recording acts are extended by the Revised Statutes to assignments of mortgages. Upon this point *Vanderkemp* agt. *Shelton* (11 *Paige*, 38), reaffirmed, and *Hoyt* agt. *Hoyt* (8 *Bosw.*, 577), distinguished and explained. (*Id.*)

REDEMPTION OF LANDS.

See **EJECTMENT.** (2 *Lansing.*)

REFEREE.

1. Where the evidence, on a trial before a referee, was greatly conflicting, and its weight depended almost entirely upon extrinsic circumstances, and the degree of credit to which witnesses were entitled, of which the referee, who saw their deportment on the stand, and who lived in the vicinage, was better qualified to judge than any reviewing court could be, who saw the witnesses only upon paper:

Held, that upon well established authority the case could not be reviewed, on appeal, upon the facts. (*Terry* agt. *McNiel*, 58 *Barb.*, 241.)

2. Whenever, in the facts found by a referee, it is seen that there has been a conflict in the testimony of the witnesses, it is well established that the finding of the referee, who has seen the witnesses, observed their manner and dispositions in testifying, and had better opportunities than the court for learning their character for veracity, must be sustained. (*Baker* agt. *Spencer*, 58 *Barb.*, 248.)
3. If portions of the evidence, standing alone tend to sustain the findings of the referee, that is sufficient. It is not the duty of the reviewing court to go further. (*Id.*)
4. If, from the evidence on paper, it even appears that the weight of evidence is against the referee's finding, the appellate court will not interfere so far as to reverse; unless such weight is so striking and palpable as to excite surprise. (*Id.*)

See **APPEAL.** (*Id.*)
APPEAL. (2 *Lansing.*)
COSTS. (*Id.*)

REFORMING INSTRUMENTS.

1. The authority which a court of equity has, to reform a written instrument does not extend to any alteration of a contract but only to making the con-

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tract in which a mistake has occurred, correct, by conforming it to what was actually agreed upon between them. (*Garner* agt. *Bird*, 57 Barb., 277.)

See BOND. (*Id.*)

RELEASE OF MORTGAGED PREMISES.

See RECORDING ACTS. (2 *Lansing*.)

RELIGIOUS CORPORATIONS.

1. Where a corporation is not made a party, its property cannot be taken from it and put into the hands of receivers. (*Groesbeck* agt. *Dunscorn*, ante, 302.)
2. The legal estate of every corporate body is vested, not in the individual corporators, but in the corporation itself; the estate, however, is a trust for the benefit of the corporators. (*Id.*)
3. By the wise policy of the law, corporate bodies are forbidden to be seized to a use; but, by a like policy, this law permits them to be vested with a trust. (*Id.*)
4. Where a plaintiff desires to establish his claim to be a corporator, or to preach in the church of the corporation, or to have a receiver appointed to take charge of the corporate property, he cannot have such relief in an action against private individuals. (*Id.*)
5. Where property is described, in a complaint, as being in the possession of defendants and their associates, styling them "The Rector, Churchwardens and Vestrymen of Trinity Church," and where it is not alleged that they are not entitled to these offices, their possession and acts are those of the corporation, and the corporation alone is the party to be held responsible for them. (*Id.*)
6. Persons, either members of or friendly to a Sunday school connected with the plaintiff, a religious corporation entitled to avail itself of the provisions of chapter 122 of the laws of 1850, as amended by chapter 235 of the laws of 1860, authorizing religious corporations to increase the facilities of public worship, signed a subscription for money to be appropriated to the erection of a building for Sunday school purposes of the said church, which subscription paper was entitled as "subscriptions and donations to the Sunday school building fund" of said church. Donors were notified that receipts would be

given them by the finance committee of the plaintiff. The subscriptions were by the signers paid over to the defendant, who was, at the time, treasurer of the plaintiff, and subsequently, he having ceased to be treasurer, and refused to pay over or account for the amount of such subscriptions paid in:

Held, that these circumstances gave to the plaintiff sufficient title to recover the same of the defendant. (*Rector, &c.*, agt. *Crawford*, 43 N. Y., 476.)

7. And this, although the original contributors had, some of them, directed the defendant not to pay over their subscriptions, and the Sunday school had a voluntary organization independent of the church. (*Id.*)

RENTS.

See ASSESSMENTS. (43 N. Y.)
EJECTMENT. (2 *Lansing*.)

RESCISSION.

1. Where, after a contract has been entered into between two parties, notice is given by one of them that the contract is rescinded on his part, he is liable for such damages and loss only as the other party has suffered by reason of such rescinding of the contract, and it is the duty of such other party upon receiving such notice, to save the former as far as it is in his power, all further damages though the performance of this duty may call for affirmative action on his part. (*Dillon* agt. *Anderson*, 43 N. Y., 232.)
2. When notice of the rescinding of a contract is given to such an agent or employe of one of the parties as is authorized to stand in his place and represent him in his business, or in the particular branch of it connected with the subject matter of the contract, it is sufficient, though such notice is not brought home to the party himself. (*Id.*)

See VENDOR AND VENDEE. (*Id.*)

RESIDENCE.

See EVIDENCE. (2 *Lansing*.)

RES JUDICATA.

See HIGHWAY. (2 *Lansing*.)

ROAD DISTRICT.

See HIGHWAY. (2 *Lansing*.)

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SALE.

See CORPORATION. (43 N. Y.)
DELIVERY. (*Id.*)

[SCIENTER.

See FRAUD. (57 Barb.)

SEDUCTION.

See EVIDENCE. (2 Lansing.)

SERVICE.

1. By the Code (§ 412) service of notice of trial by mail may be made sixteen days before the day of trial, including the day of service: and such service is good, although the last (16th) day falls on Sunday before Monday for which the cause is noticed. Therefore service made by mail, on the 4th of the month, for trial on Monday the 20th, is good. (*Central Bank of Westchester Co. agt. Alden, ante, 102.*)

2. It seems that the 2d subdivision of section 407 of the Code, providing for the computation of time, that "if the last day be Sunday it shall be excluded," does not apply to notice of trial by jury. (*Id.*)

See CONTEMPT. (2 Lansing.)

SET-OFF.

See COUNTER-CLAIM. (43 N. Y.)
EQUITABLE SET-OFF. (*Id.*)

1. The statute of set-off proceeds upon the equitable principle of not allowing one party to recover, from another, money due, while at the same time he withholds from such other that which is legally and equitably his due from himself. (*Gutchess agt. Daniels, 58 Barb., 401.*)

2. In every case where there is a good cause of action, and also a valid claim which is the subject of set-off, in the hands of the defendant, there is a mutual violation of the obligation to pay. (*Id.*)

3. An agreement by commission merchants to sell grain to be shipped to them by another firm; to apply one half of the net proceeds of the sales upon a prior indebtedness of the consignors; and that the other half shall be paid over to the latter, and not otherwise ap-

plied, is not binding upon the consignees, so as to deprive them of their legal right to set off the prior indebtedness, against the demand of the consignors in the hands of an assignee. (*Id.*)

4. In an action to recover a balance due upon a contract for sale of two separate patented processes, described in a single written agreement, for an entire sum payable in installments:

Held, that the vendee was entitled to set-off damages arising out of the vendor's fraudulent representations as to one of the processes, although the other proved to be more valuable than the price paid for both. (*Rawley agt. Woodruff, 2 Lansing, 419..*)

SEVERANCE.

See CAUSE OF ACTION. (43 N. Y.)

SEWERS.

See STATUTE. (58 Barb.)

SHAKERS.

See APPRENTICE. (43 N. Y.)

SHEEP.

See CONVERSION. (57 Barb.)

SHERIFF.

1. A deputy sheriff is as much entitled, in respect to liabilities incurred by doing an act in his official capacity, to the protection of the three years statute of limitations contained in subdivision 1 of section 92 of the Code, as the sheriff. (*Cumming agt. Brown, 43 N. Y., 514.*)

2. The seizure by the sheriff under an attachment, of property supposed to be that of the debtor, is "an act in his official capacity" within the meaning of that section of the Code, and an action for conversion against him by a third person claiming the property to be his, and not the debtor's, must be brought within three years. (*Id.*)

3. A sheriff, after having, in the manner prescribed by section 235 of the Code, executed an attachment upon a debt due from a third person to the defendant therein, may maintain an action against such debtor, to recover the amount of debt attached, or so much

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thereof as will be sufficient to satisfy the judgment in the attachment suit; provided there was in fact an indebtedness existing from such debtor to the defendant in the attachment suit, at the time the attachment and notice were served on the former. (*Lansing agt. Streeter, 57 Barb., 33.*)

4. When an attachment is thus executed by serving upon the debtor a copy of the warrant, and a notice therewith showing the property levied on, the sheriff acquires a specific lien upon the debt, if there is one; and that is a sufficient interest to enable him to maintain an action for its recovery, or enough thereof to satisfy the judgment recovered in the attachment suit. (*Id.*)

5. In order to enable the sheriff to bring the action, however, he must have actually levied upon such debt or property and subjected it to the attachment in his hands. (*Id.*)

6. But where, in such an action, the sole cause of action alleged in the complaint was that at the time of service of the attachment the defendant in such action was indebted to the defendant in the attachment suit, for property received and converted into money, and for money had and received, in the sum of more than \$500, and that he had refused to pay the same to the plaintiff; and the referee failed to find that the defendant was indebted to the defendant in the attachment suit, at the time the attachment and notice were served on him, but merely found that the former had in his hands a specified sum, the property of and belonging to the latter:

Held, that no cause of action was shown. (*Id.*)

7. Where property fraudulently assigned has been converted into money by the assignee, or the money has been converted into other property which is claimed by the assignee to belong to him, before an attachment in an action by the creditor is issued, the attachment cannot be levied upon the money or property so held as the proceeds of that assigned, and the sheriff can maintain no action against such assignee by virtue of the attachment in his hands, to recover such proceeds. (*Id.*)

8. In such a case the avails are held by the fraudulent assignee as trustee for the creditors of the assignor, and can be reached only by an action in the nature of a creditor's bill, which a sheriff cannot maintain. (*Id.*)

6 Where nothing but the debt is attached,

the sheriff can only maintain an action against the alleged debtor by proving the existence of a debt from him to the defendant in the attachment suit which the latter could enforce by action. (*Id.*)

See INSOLVENT DEBTOR. (2 *Lansing.*)

SHIPPING.

See VESSELS. (43 *N. Y.*)

SLANDER.

1. In an action for slander it is proper to allow the plaintiff, after giving evidence to prove the speaking of the actionable words alleged in the complaint, to prove the repetition of the same scandalous charge on other occasions, and subsequent to the commencement of the action. (*Johnson agt. Brown, 57 Barb., 118.*)

2. Though the plaintiff, in such an action, cannot prove the speaking of other and different actionable words, charging a different offense, yet he may prove a repetition of the same charge. This is allowed not for the purpose of proving a general malicious feeling or intention, on the part of the defendant towards the plaintiff, but to show the degree of malice with which the slander involved in the action was uttered. (*Id.*)

3. It is not erroneous for the judge to charge the jury, in an action for slander, that even if the words were spoken with the qualification, "if reports were true," that will not change the actionable nature of the words. (*Id.*)

4. A charge is equally slanderous and actionable, whether made in that form, or without the qualification. Nor can the mere fact of uttering an actionable charge in that hypothetical form go in mitigation of the damages. (*Id.*)

5. The mere form in which a slanderous charge is uttered has nothing to do with the question of damages. (*Id.*)

SPECIAL PARTNER.

1. The removal of the place of business of a "limited partnership" from the county where it was established, and where the certificate required by the statute has been duly filed in the county clerk's office, to another county, and the continuance of business, there, without filing in the clerk's office of that county any new certificate, renders it a general partnership, and the special partners liable as general partners.

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(*Van Riper* agt. *Poppenhausen*, 43 *N. Y.*, 68.)

SPECIFIC PERFORMANCE.

1. A parol promise by the owner of land to "give" it to another, accompanied by actual delivery of the possession thereof to him, will be enforced in equity by a decree for specific performance, where the promisee, induced by such promise, has made substantial improvements, and considerable expenditures upon the premises with the knowledge of the promisor. (*Freeman* agt. *Freeman*, 43 *N. Y.*, 34.)
 2. Accordingly, where the plaintiff had placed his son, and son's wife (the defendants) in possession of a lot of land, telling them it should be theirs as long as they lived, and that "he had bought the place for them, and gave it to them," and they had thereupon kept possession, partially cleared the land, and made some other improvements upon it:
 3. The real ground upon which equitable jurisdiction is exercised in such cases, either of sale, or of gift, is to prevent a fraud being practised upon the parol purchaser, or donee, by inducing him to expend his money in improvements upon the faith of the promise, and then depriving him of the benefit of such expenditures, and securing them to the seller or donor. (*Id.*)
 4. Where the defendant made an executory contract with B and C for the sale of a piece of land, they taking immediate possession, and C afterward died, leaving the plaintiff (then a minor) his heir, and his widow and B were appointed his administrators, and defaults having been made in the payments under the contract subsequent to C's death; and the defendant having notified B that the payments in arrear must be paid within a fixed time, or he would re-enter, and B having failed to pay and assenting to the re-entry, which was made:
- Held*, that the contract was at an end, and the plaintiff, as heir of C, was not entitled to specific performance.
- Held* further, that she was not entitled to a return of the moneys paid by her father in his lifetime under the contract. (*Havens* agt. *Patterson*, 43 *N. Y.*, 218.)
5. If a contract for the sale and purchase of lands has been fairly obtained, without misapprehension, surprise, mistake, or the exercise of any undue advantage, and it be not unconscionable in its

terms, the right of the party to its specific performance is a settled and positive right, which a court of equity is bound to maintain and enforce. (*Losee* agt. *Morey*, 57 *Barb.*, 561.)

6. The objection that a claim for specific performance is not of equitable cognizance, because the plaintiff has a perfect remedy at law, on the contract, in an action for damages, is not available in a case where the contract is for the purchase and sale of lands. (*Id.*)
7. In such a case, the vendee is not deemed to have a perfect remedy in an action or law for damages. He is entitled to proceed in equity, for a specific performance, although he may have another remedy at law, upon the contract. (*Id.*)
8. As a vendor can maintain his action against the vendee, for a specific performance of the contract, if the latter refuses to accept the deed and pay the price agreed, so an action for a like purpose can be maintained by the vendee against the vendor. The rights of the parties to a contract of sale and purchase, to maintain such an action, are mutual. (*Id.*)
9. Even inadequacy of consideration is no ground for refusing specific performance, unless it be so gross as to raise the presumption of fraud, unreasonableness, or great hardship. (*Id.*)
10. It is well settled in this state, that a court of equity will not disregard time, and decree a specific performance of the contract for the sale of real estate, at the suit of a party in default; unless he not only applies promptly, but has a reasonable excuse for not performing on the contract day. (*Habbel* agt. *Von Schoening*, 58 *Barb.*, 498.)
11. The defendants, who had agreed to sell a lot of land to the plaintiff, were at the place agreed on, on the day appointed, for the purpose of passing the title, and waited the whole business day, ready to complete the sale; but the plaintiff was not ready on his part, and did not appear. There was no pretext of any fraud or deceit having been practised upon him by the defendants, and the only excuse that he offered having been found not to be true, upon conflicting evidence; it was *held* that a judgment of dismissal, entered in an action brought by the purchaser for a specific performance, could not be disturbed. (*Id.*)

See CONTRACT (2 *Lansing*.)

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STAMPS.

1. The act of congress, known as the internal revenue act, so far as it prescribes a rule of evidence, as to documents wanting a proper revenue stamp, is operative only in the federal courts, and has no application to the courts of a state. (*Peepie ex rel., Barbour agt. Gates, 43 N. Y., 40.*)

2. Where, at the time of executing promissory notes, the maker authorized and directed his agent to affix the proper stamps thereto, and to cancel the same; but such agent, through inadvertence and without any intent to evade the provisions of the revenue law, or to defraud the government of the stamp duty, neglected to affix the stamps for several months:

Held, that the omission to affix the proper stamps, at the date of the notes, did not void the notes. (*Vaughan agt. O'Brien, 57 Barb., 491.*)

See DEED. (Id.)

3. Assignments introduced in evidence are not void because the stamps thereon are not canceled; where there is no evidence, or room for pretense, that they were left uncanceled for the purpose of defrauding the government. (*Graves agt. Spier, 58 Barb., 349.*)

STANDING TREES.

1. It is well settled, in this state, that standing trees form a part of the land, and as such, are real property. (*Good-year agt. Vosburgh, 57 Barb., 243*)

2. An owner in fee of the land has the same estate in the trees as in the soil, unless there has been a severance of ownership by such a conveyance as is adequate to effect it. (*Id.*)

STATUTE FORECLOSURE.

1. The heir's title to land is not divested by foreclosure sale under the statute (2 R. S., 545.) without service of the sale, on the personal representatives appointed upon the estate of the deceased mortgagor. (*Low agt. Purdy, 2-Lansing, 422.*)

STATUTE OF FRAUDS.

1. A parol promise by the owner of land to "give" it to another, accompanied by actual delivery of the possession thereof to him, will be enforced in

equity, by a decree for specific performance, where the promisee, induced by such promise, has made substantial improvements, and considerable expenditures upon the premises, with the knowledge of the promisor. (*Freeman agt. Freeman, 43 N. Y., 34.*)

2. Accordingly, where the plaintiff had placed his son, and son's wife (the defendants) in possession of a lot of land, telling them that it should be theirs as long as they lived, and that "he had bought the place for a home for them, and gave it to them," and they had thereupon kept possession, partially cleared the land, and made some other improvements upon it.

Held, in an action of ejectment brought by the plaintiff, these facts being set up by the defendant, as a ground for equitable relief, that they were entitled to a decree for specific performance by the plaintiff of his promise to give them a life estate in the land. (*Id.*)

3. The real ground upon which equitable jurisdiction is exercised in such cases, either of sale, or of gift, is to prevent a fraud being practised upon the parol purchaser or donee, by inducing him to expend his money in improvements, upon the faith of the promise, and then depriving him of the benefit of such expenditures, and securing them to the seller or donor (*Id.*)

4. Part payment on a parol contract for the sale of an interest in land does not take the case out of the statute, so as to enable the vendor to sue for the balance. (*Cagger agt. Lansing, 43 N. Y., 550.*)

5. Where a parol contract for the sale of land by the plaintiff to the defendant having been made, the latter pays a portion of the purchase-money, and thereupon a deed, fully executed, is delivered by the plaintiff to the defendant's brother, upon the agreement that when the defendant pays the balance, his brother shall deliver the deed to him, he agreeing to pay such balance.

Held, in an action to recover the sum unpaid, that it was to enforce a parol contract for the sale of land which was void, and the action could not be maintained. (*Id.*)

6. The deed executed by the vendor cannot be said to contain the terms of the contract, nor can the purchaser be held bound thereby, as it has never been delivered to, or accepted by him. (*Id.*)

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7. Neither can the action be maintained as for the purchase money of land actually sold and conveyed; for until the delivery to the defendant of the deed no title passes. (*Id.*)

7. Performance by one party of his part of an unwritten contract, which by its terms is not to be performed by the other party within one year, will not take the case out of the statute of frauds, so as to sustain an action at law against the latter for damage for non-performance. (*Weir* agt. *Hill*, 2 *Lansing*, 278.)

9. H received a dollar, under agreement to invest it in sheep, and double them every four years, until W came of age, and then to deliver them to him, and made the investment accordingly.

Held, that W at majority could only recover the money received by H to invest for his benefit, with interest. (*Id.*)

See DEFENSES. (*Id.*)

LANDLORD AND TENANT. (*Id.*)

MONEY HAD AND RECEIVED. (*Id.*)

POWER AND AUTHORITY. (*Id.*)

STATUTE OF LIMITATIONS.

1. Where, at the time of the adoption of the Code, a right of action had accrued, and was then subsisting, a subsequent oral promise to pay, is sufficient to take the case out of the operation of the statute of limitations. (*Lansing* agt. *Blair*, 43 *N. Y.*, 48.)

2. *Van Allen* agt. *Feltz* (1 *Keyes*, 332), approved and followed. (*Id.*)

3. A deputy sheriff is as much entitled in respect to liabilities incurred by doing an act in his official capacity, to the protection of the three years' statute of limitations, contained in subdivision 1 of section 92 of the Code, as the sheriff. (*Cumming* agt. *Brown*, 43 *N. Y.*, 514.)

4. The seizure by the sheriff, under an attachment, of property supposed to be that of the debtor, is "an act in his official capacity," within the meaning of that section of the Code, and an action for conversion against him by a third person claiming the property to be his, and not the debtor's, must be brought within three years. (*Id.*)

5. The statute of limitations is no defense to an action at law on a draft, brought seven years and five months after the cause of action accrued, against a party residing in Jersey City, though doing business in the city of New York,

having his office there and being there openly ten hours in the daytime of every business day. If the statute runs at all during the presence of a non-resident within the state, such presence must, in any view of the case, amount in the aggregate to six years to render the defense available. (*Bennett* agt. *Cook*, 43 *N. Y.*, 537.)

See Taylor agt. *Taylor*, 43 *N. Y.*, 578.)

LIMITATIONS, STATUTE OF. (2 *Lansing*.)

STATUTES.

1. *See* APPRENTICE. Revised Statutes, as to signing indentures by parent. (43 *N. Y.*)

1. *See* ASSESSMENTS. Act providing for assessment of rents, and act providing for reassessment of omitted property. (*Id.*)

3. *See* BOUNTY TO VOLUNTEERS. Act of 1864, as to bounties by supervisors. (*Id.*)

4. *See* CHARITABLE DEVICES AND BEQUESTS. Statutes of 1840 and 1841 as to literary corporations, taking in trust, also act of 1860 as to mortmain. (*Id.*)

5. *See* CONSTITUTIONAL LAW. Act of 1862 giving lien on vessels. (*Id.*)

6. *See* CRIMINAL LAW. Revised Statutes as to personal presence of prisoner at trial for felony. (*Id.*)

7. *See* EMINENT DOMAIN. General railroad act, and act of 1866 in reference to Albany basin. (*Id.*)

8. *See* INNKEEPERS. Act of 1855 in reference to liability of innkeepers, when safe provided, etc. (*Id.*)

9. *See* LANDLORD AND TENANT. Revised Statutes as to implied covenants in conveyances. (*Id.*)

10. *See* LITERARY CORPORATIONS. Acts of 1840 and 1841 as to power to take in trust. (*Id.*)

11. *See* PLACE OF TRIAL. Code, as to foreclosure of mortgage in county where land situated. (*Id.*)

12. *See* SHERIFF. Code, §92, as to short statute of limitations. (*Id.*)

13. *See* SPECIAL PARTNER. Limited partnership acts. (*Id.*)

14. *See* STAMPS. Internal revenue act of congress. (*Id.*)

15. *See* PARTNERSHIP. Act of 1854 as to individual bankers. (*Id.*)

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16. A statute which merely enacts that all the expenses of laying out, working and grading an avenue shall be paid in the manner provided in another act, without limiting or specifying any amount of money or tax to be raised or applied, does not "state" the tax as required by art. 7, §§ 13, 14, of the constitution. The legislature cannot devolve upon the commissioners the power to state the tax. (*Hanlon agt. The Board of Supervisors of the County of Westchester*, 57 Barb., 383.)

See APPRENTICES. (*Id.*)

ATTORNEY. (*Id.*)

COMMISSIONERS OF HIGHWAYS. (*Id.*)

CORPORATIONS. (*Id.*)

MANDAMUS. (*Id.*)

MARRIED WOMEN. (*Id.*)

MECHANIC'S LIEN LAW. (*Id.*)

MUNICIPAL CORPORATIONS. (*Id.*)

NATIONAL BANKS. (*Id.*)

RAILROAD COMPANIES. (*Id.*)

STREETS AND AVENUES. (*Id.*)

TOWNS. (*Id.*)

17. A statute affecting rights and liabilities should not be so construed as to act upon those already existing. And it is the result of the decisions, that although the words of a statute are so general and broad, in their literal extent as to comprehend existing cases, they must yet be so construed, as to be applicable only to such as may thereafter arise; unless the intention to embrace all is clearly expressed. (*Matter of the Protestant Episcopal Public School*, 58 Barb., 161.)

18. The construction of a sewer having been directed by a resolution of the common council of the city of New York, proposals for the work were opened on the sixth day of April, 1865, the contract awarded to the lowest bidder, and the terms thereof agreed upon and on the 13th of April a contract was executed between the corporation and such bidder. Intermediate the award and the execution of such contract, viz., on the 12th of April, 1865, the legislature passed an act declaring that no sewer should thereafter be constructed in said city, except in accordance with a general plan of sewerage to be devised by the Croton Aqueduct Board:

Held, that the proceedings under the resolution having been regular, and in conformity to the requirements of the city charter, they vested in the person whose bid was accepted a right of which he could not be divested without compensation, and created a liability on the part of the city to him. And that, so far as related to such vested

rights of the bidder, the statute must be construed as prospective, and not retrospective. (*Id.*)

See MANDAMUS. (*Id.*)

MARRIED WOMEN. (*Id.*)

NEW YORK (CITY OF). (*Id.*)

STAY OF PROCEEDINGS.

See PRACTICE. (2 Lansing.)

STEAMBOATS.

See VESSELS. (43 N. Y.)

STOCK.

See AGREEMENT. (57 Barb.)

ATTORNEY. (*Id.*)

PARTNERSHIP. (*Id.*)

TOWNS. (*Id.*)

1. A complaint alleged a sale of stock, by the plaintiffs to the defendants, at a specified price, deliverable at the option of the buyers, within four days. It averred that the buyers did not exercise that option, and that a tender of the stock was made to the defendants, on the fourth day, and payment demanded and refused. It also averred that the price of stock, on the day when it was tendered, was \$87 per share, being \$21 per share less than the contract price; and that the defendants had not paid for the stock:—

Held, on demurrer, that the plaintiffs had their election either to tender the stock and demand payment, and then sue for the purchase money, treating the property as belonging to the purchasers, or to keep the property, and sue for damages for breach of the contract. (*Merriam agt. Kellogg*, 58 Barb., 445.)

2. Where the article agreed to be sold is stock, it is not necessary to sell it, in order to ascertain its value; and if the value of the stock can be ascertained daily, without a sale, a sale becomes unnecessary. (*Id.*)

3. To enable vendors of stock deliverable at the buyer's option within a specified time, to recover the value of the buyer on a failure to perform, an averment of tender and demand of payment is sufficient. They need not aver that they kept the stock, and were ready to deliver it. (*Id.*)

4. In an action against a broker, to recover damages for the conversion of shares of stock alleged to have been deposited with him as security against loss, on purchases and sales of gold, for account

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of the plaintiff, the latter testified that the pledge of stock was made merely to secure a margin. The defendant swore that he required a margin of ten per cent, which he expected to receive in money, but that after the purchase of the first \$100,000, the plaintiff inquired if he could not use the stock instead of the money, and the defendant consented to take it:

Held, that by the proposition to give the defendant the stock instead of the money, and for its use by the defendant, it was clear that the intent was that the defendant should use the stock as he might lawfully have used the money; and that for doing so, he was not liable, in an action of tort. (*Lawrence agt. Maxwell*, 58 Barb., 511.)

Held, also, that as the statements of the parties were contradictory, it came within the province of the jury to decide which was the contract between them; and the judge could not take that question from the jury:

Held, further, that an offer to show that, before this transaction, shares had been deposited with the defendant, and he had hypothecated the same, and that such use of the stock being communicated to the plaintiff he made no objection thereto, should have been admitted, as showing the construction of the contract by both parties. And that it was properly for the consideration of the jury, in determining what the terms of the contract were. (*Id.*)

5. That although by the contract as stated by the defendant he had a right to use the stock in the same manner as the cash, had that been deposited, he was bound by his contract to return the stock whenever the plaintiff rendered the amount due to him, for which it had been pledged. (*Id.*)

6. That upon a tender being made, it was the duty of the defendant, at once, or within a reasonable time, to restore the stock; and that having failed to do so, the plaintiff was entitled to recover, on the contract its value. But that if the defendant, by the contract, had the right to use the stock, by hypothecation, there was no tort committed by the omission to restore it, and the plaintiff's remedy was on the contract, and not for the conversion. (*Id.*)

STOCKHOLDERS.

See PRACTICE. (2 Lansing.)

STREAM.

See WATER. (58 Barb.)

STREETS.

1. It has been heretofore held by this court, that the act passed April 26th, 1870, authorizing the court to deduct any unlawfully increased assessment in street cases in the city of New York, &c., does not apply to cases which had arisen before the passage of the act, but that such act was prospective only in requiring the amount erroneously assessed to be deducted. (*Matter of Eager*, ante, 107.)

2. Where the resolution and ordinance requires streets to be paved with Nicholson pavement, and that cross-walks be laid or relaid at intersecting streets, it is irregular not to lay such cross walks as directed by the ordinance, and yet charge upon the owners of lots the cost of laying them. It is a fraud upon the lot-owners, which entitles them to relief under the act of 1858. (*Id.*)

3. The charge of two and one half per cent. for collecting, is not erroneous. The statute gives that amount on moneys collected. This charge, as well as the cost of the work, has to be raised by an assessment on the property and the whole sum, when collected, is paid into the treasury. The statutes evidently give the per centage on the whole amount assessed and collected. (*Id.*)

4. There is no authority given by statute authorizing an assessment, to include in the contract an allowance to contractors for extra compensation, if the work is done before the time fixed in the contract. (*Id.*)

5. By the charter of the city of Lockport, the assessment for grading a street in that city is to be equally made upon the real estate deemed benefited by the improvement, and to be estimated and determined by one of the assessors of the city, &c.:

Held, no objection that the assessment was made and reported to the common council by two of the assessors of the city. (*Matter of Gardner*, ante, 255.)

6. Where the assessors, on examining the premises to be assessed, decide that the benefit to be derived from the improvement would be alike and equal to each lot, and that each lot should sustain an equal amount of the assessment; the assessment will be sustained,

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although there be but a small portion of the grading necessary to be done opposite the lots of the owner, who objects to the assessment on that ground. (*Id.*)

7. The common council of the city of Lockport, have the power and it is their duty to make and repair crosswalks in that city. These are not left to be inferred but are expressly given and imposed by the charter. And the city is liable for whatever damages individuals may sustain by reason of the omission to keep in repair such crosswalks. (*Hines* agt. *City of Lockport*, 435).

8. The common council, in addition to the powers mentioned above, have (by their charter), that of commissioners of highways of towns, and under that power it is the imperative duty of the common council to cause crosswalks, &c., to be repaired and if it is not done, the city is liable for any personal injuries to any one by reason of such neglect. (*Id.*)

9. The language of the charter is permissive—the common council may regulate, &c. But this does not authorize the common council to omit, in its discretion to perform the duty, and not be liable for damages resulting from such omission. Such is not the law. (*Id.*)

10. If the common council, in their discretion, make a new street, sidewalk, crosswalk, &c., the same discretion require it to keep them in repair, or become liable for the consequences, in case of neglect. (*Id.*)

11. If the common council desires to exempt itself from liability by reason of the want of funds, it must prove the fact, and unless proved, it is liable. (*Id.*)

12. The charter of the city of Troy, in reference to the power of the common council in opening and widening streets and alleys and keeping the same in repair, &c. (section 1 title 4) says, that "the expense of all new work or improvements and alterations, not in the nature of ordinary repairs, shall be assessed and be a lien upon the property benefited when completed, in sections or as whole, and so certified to the comptroller by local successors." (*Brenn* agt. *The City of Troy*, ante, 475.)

13. Where the common council, by resolution, directed the city engineer to establish the grade of Oakwood avenue from the Hoosick road northerly to the waterworks gate; and also directed the proper authorities to advertise for proposals, &c.:

Held, that the expense of such work should be assessed upon the property to be directly benefited thereby and not upon the property of the city at large. This was new work and not an ordinary repair, within the true construction of the above provision and all others of the charter bearing on the question. (*Id.*)

14. To justify a general tax upon the property of the city for work or improvement, in the nature of the work in question, two things are required by the charter: 1st. The work must not be new: 2d. It must be only an ordinary repair. (*Id.*)

15. A contracting board authorized by law to contract for the pavement, etc., of street according to such plan as they may adopt, and after ten day's notice in the city newspapers, to let the work to the party who shall offer to do the same at the lowest prices, have no power after publication of a notice requiring the work to be done in accordance with a plan adapted only to the Belgian pavement, to award such contract with specifications (which have not been adopted by said board), and which relate only to paving such streets with the Nicholson pavement. (*People* agt. *Board of Improvement of Union street*, 43 N. Y., 227.)

16. It is the duty of the board first to adopt plans and specifications of the work required to be done; so that those desiring to contract therefor can understandingly make offers for its performance (*Id.*)

17. This is true, although the different pavements are patented, and there can be no competition between different parties in respect to any one of them. (*Id.*)

18. Where commissioners were appointed by an act of the legislature, to lay out an avenue, and commissioners of estimate and assessment were directed to be appointed, and the damages agreed upon or awarded, and the expense of working the road were directed to be levied, assessed and collected as other town charges: but it appeared that, beyond taking the oath of office, and making a contract for the work, the commissioners had done nothing to acquire jurisdiction; that they had not laid out the avenue, although it passed, partly, through private hands; that no map was filed until after an action to set aside their proceedings was commenced, when a map was filed with no date except that of the year: that no other papers had

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been filed with the town clerk; and that no commissioners of estimate and assessment had been appointed:

Held, that the commissioners had no authority to make a requisition for the damages and expenses of opening and working the road; and that the supervisors had no authority to direct the money to be raised, and their action on the subject was not simply illegal, but wholly void (*Hanton agt The Board of Supervisors of the County of Westchester*, 57 Barb., 383.)

19. Although the remedy against unwise or unjust modes of taxation is to be sought from the legislative department, and not from the judiciary, yet the remedy against legislative encroachments upon the constitution is to be sought from the judiciary.

20. The provision of the constitution of this state (art 1, § 7) directing that when private property shall be taken for any public use, the compensation to be made therefor shall be ascertained by a jury, or by commissioners appointed by a court of record, cannot be waived by an owner of land, who chooses to make an agreement for the amount of compensation, so as to dispense with a jury or commissioners. (*Id.*)

21. The determination of the amount of compensation is in the nature of a judicial proceeding, and where the amount is to be paid for by the public, the public, as a party in interest, have a right to that proceeding. (*Id.*)

22. Under the act of the legislature for laying out Madison avenue, in Westchester county (*Laws of 1869, ch. 850*), compensation to the land owners for the land taken, must be assessed by a jury, or commissioners, before the commissioners named in the act can make a requisition upon the supervisors for the damages and expense of operating and working the avenue. (*Id.*)

23. The legislature has power to appoint commissioners to lay out an avenue in a town, although there are already three commissioners of highways in such town, competent to act. Such commissioners are not town officers. (*Id.*)

See ASSESSMENTS. (*Id.*)

STRICT FORECLOSURE.

See FORECLOSURE. (43 N. Y.)

SUBMISSION OF CONTROVERSY.

See PRACTICE. (2 Lansing.)

SUMMARY PROCEEDINGS.

1. Where *summary proceedings* are instituted by the landlord against the tenant for holding over after the expiration of his term, and a trial is had and the whole case submitted to the justice for his decision, and thereafter the justice, on motion of the landlord *discontinues* the whole proceedings; such decision of discontinuance is no bar to an action brought subsequently by the landlord against the tenant for *rent and damages* for the use and occupation of the premises. (*Gillilan agt Spratt, ante. 27.*)
2. The principles involved as to the effect of nonsuits, discontinuances, or withdrawals of actions, pending before justices of the peace, in cases tried and submitted to them upon the merits, within the time prescribed by statute for decision, have no application to such a case as this. (*Id.*)

SUPERVISORS.

See BOUNTY TO VOLUNTEERS. (43 N. Y.)

BOARD OF SUPERVISORS. 58 Barb.)
POWER AND AUTHORITY. (2 Lansing.)

SUPPLEMENTAL COMPLAINT.

1. Where two, having contracted together for the purchase of land, partition it between them and possess accordingly, and one (the plaintiff's testator and deviser) dying in possession of his part, the other (the defendant) immediately entered upon it and occupied, claiming the whole:

Held, that each was, as against the other, entitled to the exclusive possession of the portion allotted to him, independently of the question whether either or both had against the vendor the right to the possession of any part of the lot:

Held, further therefore, that the defendant was liable to the plaintiff for the rents and profits of the half allotted to the plaintiff's testator; but *held* further the defendant having died leaving children his heirs-at-law, who were made defendants by supplemental complaint, merely alleging, in addition to the original allegations, the defendant's death and their heirship, that a personal judgment against such heirs for rents and profits accruing after the death of the original defendant was unauthorized by the pleadings; and further, that proof that "the widow (of the original defendant) and his chil-

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dren have it (the land) yet," did not support a finding that the infant heirs had received rents and profits subsequent to the death of their father. (*Taylor* agt. *Taylor*, 43 N. Y., 578.)

2. The office of a bill of revivor, under the old equity practice, and of a supplemental complaint under the Code. (*Id.*)

SUPPLEMENTARY PROCEEDINGS

See RECEIVER. (43 N. Y.)

SUPREME COURT.

See GENERAL TERM. (2 *Lansing*.)

SURETY.

See GUARANTY. (43 N. Y.)
INTEREST. (*Id.*)

SURPLUS MONEYS.

See LANDLORD AND TENANT. (43 N. Y.)

SURROGATE.

1. The surrogate, having made an order directing an executor to pay moneys in accordance with a decree entered upon his accounting, may, if he neglects to comply with the order, and although it does not appear that execution has been issued on the decree, arrest the executor by attachment, the executor may show cause against his commitment (*Saltus* agt. *Saltus*, 2 *Lansing*, 9.)
2. The remedy against a surrogate's *ex parte* order is, it seems, by motion to the surrogate, and not by appeal. (*Id.*)
3. The claims set forth in an executor's petition for authority to sell, mortgage or lease his testator's real estate (2 R. S., 102, § 1, &c.) were in the aggregate \$4,314; upon the hearing the executor admitted funds in hand to the amount of \$1,332, and formal proof was given of liabilities of the estate to the extent of \$1,723; the surrogate, without hearing further proof, directed the sale of a farm valued at \$6,200.

Held, on appeal, that the order should be affirmed. (*Barnett* agt. *Kincaid*, 2 *Lansing*, 320.)

Held, further, that the surrogate might refuse upon the hearing to hear testimony offered for the purpose of establishing a disputed claim. (*Id.*)

4. *Quere*. Whether the surrogate may direct the leasing of land, on such an application, where all the parties interested in the real estate are adults. (*Id.*)

See EXECUTORS AND ADMINISTRATORS. (*Id.*)

SUSPENSION OF POWER OF ALIENATION.

See PERPETUITIES. (43 N. Y.)
WILLS. (*Id.*)

SURVEYS

See EVIDENCE. (57 *Barb.*)

T.

TAXATION OF COSTS.

See EXECUTORS AND ADMINISTRATORS (2 *Lansing*.)

TAXES.

1. Where an action is brought against a municipal corporation to recover a tax which was unlawfully levied and collected, and which subsequent to its collection, upon a writ of certiorari being sued out, and the assessment brought before the court, was annulled and the assessment adjudged to be invalid. *Held*, that the corporation was bound to refund to the plaintiff such portion of the tax as was received by it, notwithstanding that the officers who collected such tax were not appointed or controlled by such corporation. (*Bank of Commonwealth* agt. *Mayor of New York*, 43 N. Y., 184.)
2. Where the assessors have jurisdiction of the person and subject matter for the purpose of an assessment of property for taxation, act judicially; and while the assessment remains in force, no action will lie for the recovery of the tax so paid, although the property was not by law the subject of taxation. (*Affirming*, 37 N. Y., 511.) (*Id.*)
3. When taxes are received by a public officer, the law presumes that they are paid over to the persons to whom they are directed to be paid by law. (*Id.*)

See ASSESSMENTS. (*Id.*)
EVIDENCE. (*Id.*)

TAXES AND ASSESSMENTS.

1. In determining the amount of personal property of an individual, by

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assessors or commissioners of taxes, for the purpose of taxation, *stocks and bonds of the United States* are to form no part of the estimate. They cannot be excluded or deducted from the amount of his assets, liable to taxation, for it is error to include them in such assets. (*The People* agt. *The Commrs. of Taxes and Assessments*, ante, 459.)

2. *Taxation of all property* is the general rule of the statute. It provides as follows: "All lands, and all personal estate within this State, whether owned by individuals or corporations, shall be liable to taxation, subject to the exemptions hereinafter specified." (1 *R. S.*, 387, § 1. 1st ed.) (*Foster* agt. *Van Wyck*, ante, 493.)

3. By the same statute, (p. 390, § 8), it is made the duty of the assessors, "to ascertain, by diligent inquiry, the names of all the taxable inhabitants in their towns or wards, and also all the taxable property, real and personal, within the same." (*Id.*)

4. *Bank shares*, owned by inhabitants of the towns or wards within the jurisdiction of the assessors, falls within the description of property declared by the first section of the act above quoted, to be liable to taxation. (*Id.*)

5. It may also fall within one of the exemptions; but being property *prima facie* liable to taxation and the duty of the assessors being to ascertain all the taxable property, real and personal, within their town or ward, this property presents itself to them for their decision whether it is taxable or exempt from taxation. (*Id.*)

6. It being personal property within their town or ward, it is within their jurisdiction, as assessors; they have the right, and it is their duty to examine the question whether it is liable to taxation, and this is a judicial inquiry. One in which the highest courts have differed; and should they make a mistake, and hold it liable to taxation when it is not, they should not, for such mistake, be held liable as wrong doers. (*Id.*)

7. And it makes no difference whether this immunity from taxation arises from State law or national law. It is equally a judicial decision, of the assessors in either case, having equal protection from liability for having decided erroneously. (*Id.*)

8. If the assessors, having jurisdiction of the subject matter and of the persons

of the owners of the property assessed have failed to follow the *directions of the statute in making up their roll*, their action is irregular and open to correction upon proper application to the supreme court; voidable but not void. (*Id.*)

See CERTIORARI. (57 Barb.)
INJUNCTION. (*Id.*)

TAX TITLES.

See ASSESSMENTS. (43 N. Y.)
BURDEN OF PROOF. (*Id.*)
EVIDENCE. (*Id.*)

TENANCY BY THE CURTESY.

1. As a general rule, actual seizin of the wife during coverture is necessary to a tenancy by the curtesy. (*Ferguson* agt. *Tweedey*, 43 N. Y., 513.)

2. Where there is an outstanding estate for life, the husband cannot be the tenant by the curtesy of the wife's estate in reversion or remainder, unless the particular estate terminate during coverture. (*Id.*)

3. The wife of the plaintiff being co-devisee with her brother of a certain farm, with a limitation over on the death of either without issue to the survivor, by deeds interchanged with her brother before marriage, partitioned, until either should die without issue and no longer the farm devised, and went into exclusive possession of the part conveyed to her, the brother taking exclusive possession of the part conveyed to him. The wife died leaving issue (the defendant), and subsequently the brother died without issue. *Held*, that the plaintiff had no tenancy by the curtesy in the land conveyed to the brother. (*Id.*)

4. The estate of tenancy by the curtesy survives to the husband on the decease of his wife, in all her real property, to which it would have attached at common law, and over which she has not exercised the power of disposition given by the married woman's act of 1848 and 1849. (*In the Matter of Francis M. Winnie, an Infant*, 2 Lansing, 21.)

So held, reversing the decision at Special Term in this case. (*Id.*)

TENANCY AT WILL AND BY SUFFERANCE.

1. A tenant at will has no estate that can be granted by him to a third person and one who enters on land under a

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lease or assignment from a tenant at will, is a disseizor, and is liable in trespass at the option of the landlord. The same rule applies to a tenant by sufferance. (*Reckhow agt. Schanck*, 43 N. Y., 448.)

2. Accordingly, in an action of ejectment, where one of the defenses urged was that the defendants were the lessees, and had succeeded to the possession of tenants at will of the plaintiff and had received no notice to quit under the statute:

Held, that the facts did constitute them either tenants at will or by sufferance, and no notice to quit to them was necessary. (*Id.*)

TENANTS IN COMMON.

1. One tenant in common has a right to take peaceable possession of the premises owned in common; and although such possession is acquired by stealth, yet if without tumult or a breach of the peace, it will not be illegal. (*Wood agt. Phillips*, 43 N. Y., 152)
2. One tenant in common has no right to oust or debar his co-tenants from joint possession with him; but if such co-tenants, after overcoming such attempt to oust them, and regaining possession, lay hands upon their co-tenant and remove him by force from the common property, they are liable for assault and battery. (*Id.*)

See CROPS. (2 *Lansing*.)

OWNERSHIP IN COMMON OF CHATELS. (*Id.*)

TENDER.

See STOCK. (58 *Barb.*)

TIME.

See INSURANCE. (FIRE.) (57 *Barb.*)

TITLE.

1. Where a daughter received, as a gift from her mother, an ewe lamb, and an agreement was made at the same time by the mother with her father—the daughter's grandfather—to keep the sheep for the granddaughter, upon the terms of giving the latter all the increase, and the grandfather to have the wool for the keeping; and the increase for some six years amounted to seventeen sheep:

Held, on a constable's sale of these seventeen sheep, upon an execution against the grandfather, as the property of the latter, that he had no title to these sheep; he was a mere bailee thereof; nor had he any title to the wool, until he had performed his entire contract of keeping the sheep till shearing time; and for the entire performance of this contract on his part, he was entitled to the consideration promised, to wit: the wool; and part performance, on his part, only, gave no title; and the constable, by his levy, took no other or better title than the bailee had. The title to the sheep was in the granddaughter—the plaintiff. (*Hasbrouck agt. Bouton*, ante, 208.)

See DEED. (57 *Barb.*)

TOWNS.

1. Where any commissioner, appointed under the act of March 31, 1856, authorizing certain towns to subscribe to the capital stock of the Albany and Susquehanna Railroad Company (*Laws of 1856, ch. 61*), and the acts amending the same (*Laws of 1857, ch. 401*; *Laws of 1858, ch. 381*), to borrow money on the credit of the town, shall refuse or neglect to perform any part of the duties specified therein, his office will thereupon become vacant and the county judge, upon the application of twelve resident freeholders, and upon proof of the fact to his satisfaction, has jurisdiction to appoint some other person to fill his place. (*The People ex rel. Wilbur agt. Eldy*, 57 *Barb.*, 594.)
2. The act of 1859 (*ch. 384*) was in *pari materia* with the statutes of 1856 (*ch. 64*), and of 1857 (*ch. 401*), which authorized the appointment of commissioners and prescribed their duties; and they must all be construed together, as constituting one system or one act. (*Id.*)
3. And where, upon an application by twelve resident freeholders, to the county judge, and proof to him, he found, as facts, that commissioners appointed under the acts, made a contract to sell stock subscribed for by them in the name of a town, on certain conditions, one of which was that the purchasers should first have the use of the stock, to be voted upon at a future election of directors of the corporation for certain persons named in the contract of sale; that they refused to sell the stock for cash, at par: and that they sold the same on credit; and the county judge thereupon adjudged and determined that it was the duty of the com.

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missioners, if they sold the stock, to sell it for cash, at par; that for their neglect or refusal to perform that duty their offices had become vacant; and that the defendants should be appointed in their places:

Held, that the findings were legitimate, and the adjudication right. (*Id.*)

4. The statute obviously intended to intrust the power of deciding the question whether commissioners appointed thereunder have refused or wilfully neglected to perform any part of the duties of their offices, to the county judge; and while his action, like the action of all other inferior officers, can be made the subject of review by the Supreme Court, on *certiorari*, the practice, in that respect, as to reviewing facts, is, by analogy, to be governed by the same rules as are observed on appeals and *certioraris* from inferior jurisdictions in other cases, viz., if there is evidence in the case which will, when fairly weighed, sustain the decision, this court will not interfere upon the ground that in their opinion a stronger case has been made out by the unsuccessful party. (*Id.*)

TRADE-MARKS.

1. The principle which underlies the doctrine of trade-marks is, that he, who by his skill, industry or enterprise, has produced or brought into market or service some commodity or article of use, convenience, utility, or accommodation, and affixed to it a name, mark, device or symbol which serve to designate it as his, is entitled to be protected in that designation from encroachment, so that he may have the benefit of his skill, industry or enterprise, and the public be protected from the fraud of imitators. (*The Congress and Empire Spring Co. v. The High Rock Congress Spring Co.*, 57 Barb., 524.)

2. The doctrine of trade-marks can have no application to a name given to a natural element in its natural state. (*Id.*)

3. All the cases reported are cases where the marks infringed were used and applied to artificial compounds, products or manufactures originated by the science, skill, diligence or enterprise of man; and in all these cases the principle of the law is stated and restated as applicable to protect the skill, industry and enterprise of mechanics, manufacturers and inventors; and hence only applicable to artificial products. (*Id.*)

4. Where the plaintiff as owner of a mineral spring, called the "Congress Spring," and widely known as such, and its water by the designation of "Congress Spring water," for over seventy years, was entitled to the rights of its predecessors in the use of the word "Congress," and that word had previously only been used and applied to water in connection with said spring and its water: it was yet *held*, that as the water was not an artificial product, and there was nothing in the mode of bottling the water for sale, or the mode of sale, originating with the plaintiff, or the former owners, which the word "Congress" defined, designated or implied, the plaintiff had no exclusive right to the use of that word in connection with such business, or connection with the word "water," or the words "spring water." (*Id.*)

5. Accordingly *held*, that the plaintiff was not entitled to an injunction against a corporation called the "High Rock Congress Spring Company," the owner of another mineral spring, named the "High Congress Spring," to restrain such corporation from using the name "High Rock Congress Spring Company," or any name containing "Congress Spring Company," in its business of putting up mineral waters; or from using or putting upon any bottles, corks, boxes or packages, &c., the words "Congress Water," or "Congress Spring Water," either alone or in connection with other words, &c. (*Id.*)

6. A name can only be protected as a trade-mark when it is used merely as indicating the true origin or ownership of the article offered for sale. Never when it is used to distinguish the article itself, and has become, by adoption and use, its proper appellation. (*Id.*)

Held, that within the above principle neither the plaintiff or its predecessors acquired or could acquire any property in, or exclusive right to the use of the word "Congress," in connection with the word "water," or the words "spring water;" because that word had no relation to, and did not indicate the origin or ownership of the article named, but only designated the article itself, which designation had become, by adoption and use, its proper appellation. (*Id.*)

TRESPASS.

See TENANCY AT WILL. (43 N. Y. EVIDENCE. (2 Lansing) DEFENSE. (*Id.*))

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TRESPASS TO LAND.

See PLEADING. (2 *Lansing*.)

VENDOR AND PURCHASER OF LAND. (*Id.*)

TRIAL.

1. Where an answer admits the making and delivery of a promissory note and sets up an affirmative defense, the affirmative is with the defendant who is entitled to open and close the case, and the refusal of the court to allow him so to do, is error, for which judgment will be reversed and a new trial ordered. (*Lindsley* agt. *European Petroleum Co.*, ante, 56.)

See CHARGE OF THE COURT. (*Id.*)

2. Where a party upon the trial rests his case upon certain positions which he calls upon the court to rule in his favor as questions of law arising upon undisputed facts, if he also desires that any question of fact in the case be submitted to the jury, he must specify it and ask that it be so submitted. In the absence of this, his mere exception to the ruling of the judge that there is no question for the jury, is unavailing. (*O'Neill* agt. *James*, 43 *N. Y.*, 85.)
3. When evidence has been improperly rejected and the judgment is sought to be sustained on the ground that the facts established by the verdict show that the evidence if admitted, would not have changed the result, it must appear that such is necessarily the effect of the verdict; not that the jury might, but that they must have found as claimed. (*Starbuck* agt. *Barrons*, 43 *N. Y.*, 200.)
4. It is error to suffer to go to the jury any evidence given by a witness on direct examination for the people, where by sudden illness or by death of such witness or other cause without the fault of and beyond the control of the prisoner, he is deprived of his right of cross-examination. (*People* agt. *Cole*, 43 *N. Y.*, 508.)
5. Accordingly on the trial of the prisoner for grand larceny, the wife of the prosecutor, having given material evidence in behalf of the people on her direct examination by the district attorney, fainted away and went into convulsions immediately after such direct examination was closed, and before the prisoner had any opportunity of cross-examining her, and so remained until the close of the trial. *Held*, the court having refused either to

strike out her testimony or adjourn the trial until she should become able to bear cross-examination, or to discharge the prisoner, that it was erroneous to permit her evidence to go to the jury. (*Id.*)

See ARREST OF JUDGMENT. (*Id.*)

CRIMINAL LAW. (*Id.*)

EXCEPTIONS. (*Id.*)

JURY. (*Id.*)

PLACE OF TRIAL. (*Id.*)

PLEADING. (*Id.*)

EVIDENCE. (2 *Lansing*.)

DEFENCE. (*Id.*)

TROVER.

See CONVERSION. (57 *Barb.*)

TRUST.

See EXECUTORS AND ADMINISTRATORS. (2 *Lansing*.)

TRUST PROPERTY.

1. Where the cause of action survives by virtue of the statute, section 121 of the Code saves the action from abatement, on the death of a party. (*Emerson* agt. *Bleakley*, ante, 511.)
2. Where personal property is held in trust, on the death of the trustee, it passes, under the common law, to his personal representatives, who are bound to execute the trust. (*Id.*)
3. The Revised Statutes relative to uses and trusts, does not relate to *personal property*, but the common law rule still exists, and applies in reference to such property. (*Id.*)
4. Where, on the death of a plaintiff in an action, who sues as trustee, the court appoints a person in place of the deceased, to execute the trust upon the express consent and stipulation of the defendant, the latter cannot, on motion at the trial, have the complaint dismissed, on the ground that the title to the property was in the personal representatives of the deceased. (*Id.*)

TRUSTS AND TRUSTEES.

1. The testator devised and bequeathed all his residuary real and personal estate to his executors in trust, to receive the income and to apply it according to the directions of the will, during the life of the testator's widow; upon her death, to sell certain lots, and cause the residue of the estate to be appraised by the appraisers, one of whom should be chosen by the surrogate of the city

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of New York; to divide the whole into twelve equal parts; to convey, transfer and pay over to the testator's son W., in fee simple, to whom he gave, devised and bequeathed the same, or, in case of his death to his then living lawful issue, three of said parts; to convey, etc., to the testator's son, E., in fee simple, and he gave, devised and bequeathed the same to him, or, in case of his death prior to the time of such distribution, to his then living lawful issue, three other of said parts; to retain and hold as trustees under said will, and he gave, devised and bequeathed the same to them accordingly, two other of said parts, in trust to invest, lease, etc., and receive the income, etc., and apply it to the use of his daughter, M., during her life, with remainders over after her decease. He created like trusts as to two other shares of two-twelfths each, for the benefit of his two daughters, C. and F., respectively. He directed that the shares of each of the sons, and daughters should include certain real estate, specifically described, at its appraised value; that in case of the decease of either of his said sons prior to such division, leaving no lawful issue living at the time of such division, the surviving son, or in case of his death, his lawful issue then living, should take the share of the deceased son; and that, in case of the death of either of the daughters previous to the time of distribution, the trustees should retain her share upon certain trusts for her issue.

Held, that the estate of the trustees under the general residuary devise would terminate upon the death of the widow.

That the trust to receive the rents, etc., would cease with the trust to apply them.

That the trust to sell vested no estate in the trustees.

That the trustees to appraise, divide and convey were unauthorized as trusts, but could be executed as powers.

That upon the death of the widow the devises to the sons and trustees for the daughters respectively would immediately take effect in actual enjoyment.

That the trusts to sell, appraise and divide did not suspend the power of alienation of the real estate or the absolute ownership of the personal property, but that from the time of the death of the widow and pending the

division, the sons, and the trustees for the daughters, would be entitled to the possession and enjoyment, as tenants in common of the undivided property subject to the power of sale and division.

That the limitations in case of death of sons or daughters, "prior to the time of such distribution," or "prior to such division," or "previous to the time of distribution," referred to the time appointed for the division, viz., the death of the widow.

That the sons, or their issue then living, would take the shares which were given absolutely, and the daughters, or their issue then living, would take the beneficial interest in the shares given in trust. (*Manice* agt. *Manice*, 43 N. Y., 203.)

2. A trust to apply rents, etc., to the use of more than two beneficiaries is valid, if it is limited in its duration to the life of one of them. (*Id.*)

3. A general devise to executors in trust vests no estate in them, except for such of the declared purposes as require that the title be vested in them. (*Id.*)

4. A void trust, which is separable from other valid trusts, may be cut off, where the trust thus defeated is independent of the other dispositions of the will and subordinate to them, and not an essential part of the general scheme. (*Id.*)

5. A devise of land to trustees directing them to execute and deliver to a corporation a deed of conveyance thereof, for the uses and purposes and with the restrictions set forth in the will, creates no valid trust in such trustees, and gives them no title, but vests immediately and absolutely in such corporation the land devised. (*Adams* agt. *Perry*, 43 N. Y., 487.)

6. A devise of real and personal to trustees, to sell the land and invest the avails, together with the personal in specified securities, and pay to a certain educational corporation, annually, the income to be devoted by such corporation to certain specified purposes, creates an active trust, and the title to the fund does not pass to the corporation. (*Id.*)

7. A trust created by will for the purpose of enforcing a forfeiture of lands devised in case of non-compliance with a condition subsequent is not authorized by the Revised Statutes and is void. It is the right of the heirs of the testator to claim the benefit of such forfeiture. (*Id.*)

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See ACCUMULATIONS. (*Id.*)

EDUCATIONAL CORPORATIONS. (*Id.*)

WILLS. (*Id.*)

RAILWAYS. (*Id.*)

COMMON CARRIERS. (2 *Lansing*.)

8. It is an established rule of equity, that where trust and confidence are reposed by one party in another, and the latter accepts the confidence or trust, equity will convert him into a trustee whenever it is necessary to protect the interest of the party so confiding, and do justice between them. (*Foots* agt. *Foots*, 58 *Barb.*, 258.)

9. Certain premises were conveyed to the plaintiff's husband, the consideration therefor being mainly paid by the plaintiff. Subsequently, in 1844, for the purpose of protecting the property, and of keeping it for the plaintiff's use, the plaintiff and her husband conveyed the same to S. F. and O. F., without a consideration. S. F. then conveyed the same to O. F. without consideration, upon a parol agreement that the grantee should hold the same for the plaintiff's benefit. After the execution of the deed to him, G. F. always recognized, so long as he lived, the fact that the premises belonged to, and were the property of the plaintiff, and that he held the same simply for her benefit. The plaintiff, with her husband, had for more than 20 years held uninterrupted and undisputed possession of the premises and paid taxes thereon. In 1854 G. F. made a will, by which he devised the premises to the plaintiff. In 1853 he was married to the defendant E. F., and had issue, the defendant C. F., and died in 1864. The plaintiff claimed the premises as belonging to her, in fee, and the defendants claimed that G. F. was the owner thereof, and that upon his death his widow became entitled to an estate in dower therein, and his daughter C. F. to an estate in the remainder in fee. There were no creditors whose rights were involved. *Held*: 1. That the transaction was simply the naked transfer of the nominal title of the property to G. F. to be held without interest in him, for the benefit of the plaintiff. 2. That the referee having found as a fact, that G. F. in taking a deed of the property intended in good faith to hold it in trust, as the protector of the plaintiff's rights, and only for her benefit, the court would not permit those claiming under G. F. to insist that he held it absolutely as the true and lawful owner. 3. That had G. F., at any time during his life, attempted to dispossess the plaintiff of the estate he so held nominally for her benefit, a court of equity would have

restrained him, upon application, and, upon demand, have compelled him to convey the title to her. 4. That the section of the statute relative to fraudulent conveyances. (2 *R. S.* 134, § 6,) which requires that every trust or power over or concerning lands shall be by deed or memorandum in writing, had no application to the case. 5. That it was no objection to the granting of relief to the plaintiff that there was no written agreement between her and G. F. That equity made the latter a trustee *ex natefacto*. 6. That the defendants could interpose no defense of the statute of uses and trusts, or the statute of frauds, that G. F., through whom they claimed, could not set up. That it would be fraudulent in him to deny the plaintiff's equitable title to the property; and a court of equity would not allow him to set up either of those statutes to be used as instruments of fraud. (*Id.*)

10. Implied and resulting trusts are, from their very nature, excepted from the provisions of the Revised Statutes relative to uses and trusts. (*Id.*)

11. Their existence, generally speaking, can only be established by parol evidence; and it requires the power of a court of equity to compel the performance of such implied agreements, and to protect the rights and interests of the *cestui que trust* therein. This power has, in no respect, been abridged or impaired by the Revised Statutes. (*Id.*)

See LEASE. (*Id.*)

U

UNCERTAINTY.

See CONTRACT. (2 *Lansing*.)

USURY.

1. When a lender stipulates for a contingent benefit beyond the legal rate of interest, and has the right in any event to demand the repayment of the principal sum with the legal interest thereon, the contract is in violation of the statute prohibiting usury, and is void. (*Brown* agt. *Vredenberg*, 43 *N. Y.*, 195.)

2. In an action brought to have securities given to secure a usurious loan declared void, the offer of the plaintiffs in their complaint to pay the principal sum with lawful interest, must be accepted by the defendant, if at all, before judg-

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ment, and cannot be enforced by motion on the part of the defendant, or after judgment has been entered against him in the action. (*Id.*)

3. *Quere.* Whether even upon the offer, the court could have required compliance with it. (*Id.*)

See NATIONAL BANKS. (57 *Barb.*)

4. The defendants took a mortgage from the plaintiff, and gave back an agreement to pay the mortgagor the amount secured, with interest on the mortgage; the bond and mortgage were then transferred by the mortgagor to the superintendent of the banking department, as security for circulating notes issued to the former, equal in amount to the sum secured, and it had been given for the purpose of such transfer:

Held, that the transaction was not usurious. (*Perine* agt. *Hotchkiss*, 2 *Lansing*, 416.)

V.

VALUE.

See EVIDENCE. (43 *N. Y.*)

VARIANCE.

See PLEADINGS. (2 *Lansing*.)

VENDOR AND PURCHASER.

1. In the absence of any express contract, fraud or imposition, there can be no responsibility on the part of the vendor, for the quality of what is sold as slops or swill from a distillery. If the purchaser has what he bargained for, viz., slops from a distillery, the doctrine of *caveat emptor* applies. (*Holden* agt. *Clancy*, ante, 1.)
2. Where the defendant made an executory contract with B and C for the sale of a piece of land, they taking immediate possession, and C afterward died, leaving the plaintiff, (then a minor) his heir, and his widow and B were appointed his administrators; and default having been made in the payments under the contract subsequent to C's death; and the defendant having notified B that the payments in arrear must be paid within a fixed time or he would re-enter, and B having failed to pay and assenting to re-entry, which was made. *Held*, that the contract was at an end and the plaintiff, as heir of C, was not entitled to specific per-

formance. *Held*, further that she was not entitled to a return of the moneys paid by her father in his lifetime under the contract. (*Havens* agt. *Patterson*; 43 *N. Y.*, 218.)

3. Part payment on a parol contract for the sale of an interest in land does not take the case out of the statute so as to enable the vendor to sue for the balance. (*Cauger* agt. *Lansing*, 43 *N. Y.*, 550.)
4. Where a parol contract for the sale of land by the plaintiff to the defendant having been made, the latter pays a portion of the purchase money, and thereupon a deed, fully executed, is delivered by the plaintiff to the defendant's brother, upon the agreement that when the defendant pays the balance, his brother shall deliver the deed to him, he agreeing to pay such balance. *Held*, in an action to recover the sum unpaid, that it was to enforce a parol contract for the sale of land, which was void, and the action could not be maintained. (*Id.*)
5. The deed executed by the vendor cannot be said to contain the terms of the contract, nor can the purchaser be held bound thereby, as it has never been delivered to or accepted by him. (*Id.*)
6. Neither can the action be maintained as for the purchase-money of land actually sold and conveyed; for until the delivery to the defendant of the deed, no title passes. (*Id.*)
7. Where two, having contracted together for the purchase of land, partition it between them and possess accordingly, and one (the plaintiff's testator and deviser dying in possession of his part, the other (the defendant) immediately entered upon it and occupied, claiming the whole. *Held*, that each was as against the other, entitled to the exclusive possession of the portion allotted to him, independently of the question whether either or both had against the vendor the right to the possession of any part of the lot. *Held*, further, therefore that the defendant was liable to the plaintiffs for the rents and profits of the half allotted to the plaintiff's testator. (*Taylor* agt. *Taylor*, 43 *N. Y.*, 578.)
8. Where wood is sold subject to inspection and measurement by a railroad inspector of wood, the purchaser is entitled to have the same actually measured by such inspector, or to have something done which be equivalent to a measurement. He is not bound by the mere guess, or loose estimate by the eye, of such inspector, as to the quan-

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nity. (*McAndrews* agt. *Santee*, 57 *Barb.*, 193.)

9. Where a purchaser of land after paying a portion of the consideration, and promising to pay the rest, fails to do so, he cannot, on being sued for the balance of the consideration, set up his own breach of promise as a defense to the action, in this, that because he did not perform, the statute of frauds applies; where he, by reason of the performance by the vendor of everything on his part agreed to be performed, is in possession, and is enjoying the benefits of the estate purchased. (*Cagger* agt. *Lansing*, 57 *Barb.*, 421.)

10. One who purchases land, with knowledge of another's right thereto, under a contract of purchase, takes his title subject to such right; and that being so, either the deed to him will be set aside, or he will, with his wife, be directed to convey to the person having the prior right. (*Loose* agt. *Morey*, 57 *Barb.*, 561.)

See EVIDENCE. (*Id.*)

SPECIFIC PERFORMANCE. (*Id.*)

11. Whatever is done between the parties, under a supposed agreement, where there is a mutual misunderstanding as to its terms, is not binding; and though both parties consent at the time, to the delivery of a portion of the property agreed to be sold, each supposing that such delivery and acceptance is to be a part performance of the contract, and that the purchaser will only become the absolute owner when the whole contract shall have been performed, the law will not imply that either of the parties intended that the property delivered was to be absolutely the purchaser's in case he failed to comply with the whole agreement. (*Fullerton* agt. *Dalton*, 58 *Barb.*, 236.)

12. Where one is in possession of property with no other claim of title thereto, than a partial or conditional one, as purchaser under a void contract of sale, which each party refuses to perform, except according to his own understanding of its terms, the title of the property is not changed, and the vendor is entitled to recover such property, upon legal demand made. (*Id.*)

13. After demand of such property is made, the purchaser is wrongfully in possession; and his use of the property afterwards is a conversion thereof to his own use. (*Id.*)

14. The defendant, representing to the plaintiff that he had the agency for the sale of a sewing machine, for a partic-

ular county, and the right to sell and transfer the same, sold and transferred such agency to the plaintiff, who relying upon the truth of such representation, gave his note for the price, and subsequently paid the same. In an action by the plaintiff to recover back the money so paid, the referee found, upon conflicting evidence, that the defendant had not in fact any agency for said county, or right to sell and transfer the same, and all that his representations were false.

Held, that this finding warranted the conclusion that the plaintiff was entitled to recover back the purchase money paid by him, with interest. (*Baker* agt. *Spencer*, 58 *Barb.*, 248.)

15. If there were a warranty of merchantable quality implied to such a sale, purchasers cannot recover damages on account of the inferior quality of the slops furnished, where it appears that they received and consumed the slops, from day to day, with a full knowledge of their quality, and without returning, or offering to return them, or giving the vendors notice to take them away, or not to deliver any more. (*Id.*)

16. Such conduct on the part of purchasers upon well settled principles governing executory contracts of sale, is a complete waiver of any defects in the quality of the article purchased, and brings the case within the principle of *Reed* agt. *Ramsdell* (29 *N. Y.*, 358.) (*Id.*)

See LIEN. (*Id.*)

PROMISSORY NOTES. (*Id.*)

SPECIFIC PERFORMANCE. (*Id.*)

STOCK. (*Id.*)

WARRANTY. (*Id.*)

17. A vendor who has been induced to sell his goods by fraudulent representations, is not estopped from ratifying the sale by any act of disaffirmance which is not effectual for that purpose, and does not extend to the entire contract. (*Kinney* agt. *Keirnan*, 2 *Lansing*, 492.)

18. Thus where the vendee obtained a sale of goods for the checks of third person which he fraudulently represented as good, and which came back to the vendor under protest, and the latter sued a purchaser of part of the goods from the vendee, after demand upon such purchaser and his refusal to deliver the same, to recover the value thereof, but without notice of disaffirmance to the fraudulent vendee, and return, or offer of return to the latter, of the protested checks,

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Held, that there was not such disaffirmance of the contract of sale as prevented a subsequent action thereon. (*Id.*)

19. And a suit by such vendor against the vendee to recover the whole price, and settlement of the suit, with receipt of part of the sum agreed to be paid thereon, is a ratification of the contract and will bar proceedings for the fraud. (*Id.*)

20. The vendor, after demand and refusal brought an action against one to whom his fraudulent vendee had sold a portion of the goods, and afterward sued such vendee to recover the whole price due upon the sale to him, and then made a settlement, of the latter suit for a sum agreed on, on which sum he received a part payment:

Held that the last suit was an affirmation of the contract, and a bar to a recovery in the former suit, and that this was so, although by agreement at the time of the settlement, the subject matter of the first suit was reserved therefrom. (*Id.*)

21. *Pearse* agt. *Pettis*, (47 *Barb.*, 276,) cited and explained. (*Id.*)

See **BILLS OF EXCHANGE AND PROMISSORY NOTES** (*Id.*)

FRAUD AND FRAUDULENT SALES. (*Id.*)

CONTRACT. (*Id.*)

INSOLVENT DEBTOR. (*Id.*)

JUDGMENTS AND EXECUTORS. (*Id.*)

MISTAKE OF FACT. (*Id.*)

SETT-OFF. (*Id.*)

22. By the terms of a contract for sale of timbered land, the vendee agreed that half of all the timber prepared for market should be applied upon the purchase, and that he would not remove any timber without the vendor's consent until the purchase money should be paid; he was to pay the taxes, and have a deed on full compliance with the terms of the contract, and, on his failure to perform, it was provided that the vendor should have the right to take possession:

Held, that the vendee had a right of immediate entry, and though not in actual occupancy at the time, such constructive possession under the contract as enabled him to maintain trespass against one who wrongtully cut timber on the premises. (*Phillips* agt. *De Groat*, 2 *Lansing*, 192.)

23. *Held*, further, the vendee having contracted for sale of the land, with reservation of the timber, and for its possession, "except so far as relates to

the timber," that he could maintain trespass against one who entered under an assignee of the contract of sale, and cut down trees. (*Id.*)

24. And that an action against such assignee, for the conversion of timber previously cut upon the premises, would lie by the said vendee by reason of his special property therein, and that, if the effect of the agreement with his vendor was to pledge the timber as security, he was entitled to show a waiver of fulfillment of the conditions of the pledge. (*Id.*)

See **CONTRACT.** (*Id.*)

GUARDIAN AND WARD. (*Id.*)

LANDLORD AND TENANT. (*Id.*)

MONEY HAD AND RECEIVED. (*Id.*)

VERDICT.

See **DAMAGES.** (58 *Barb.*)

1. A verdict improperly influenced, by misdirection of the judge, will be set aside on motion upon a case made, although no exception has been taken at the time of the charge. (*Benedict* agt. *Johnson* 2 *Lansing*, 94.)

VESSELS.

1. In November, 1862, the defendant's bark, *Antietam*, being ashore near the Delaware Breakwater he sent a telegram to his agents in New York, as follows: "Lewes, Del., Nov. 13, 1862. To Metcalf & Duncan: Send me small tug-boat, steam-pump, engineer, my diving apparatus and diver, or telegraph Eben Eaton, 90 Bolton Street, South Boston, to come. Make the best trade you can. W. A. FARNSWORTH," which was received same day. (*Martin* agt. *Farnsworth*, ante, 59.)

2. Messrs. Metcalf & Duncan chartered the plaintiff's tug-boat, *May Queen*, to go down to the Delaware Breakwater upon that service. The terms of the charter were all agreed upon, except that the plaintiff required a coast pilot to go with him on his tug-boat. Messrs. M. & D. asked plaintiff what a coast pilot would cost; he answered that he did not know, that he would get one as cheap as he could. Afterwards he selected a coast pilot, and introduced him to Messrs. M. & D., who inquired of the plaintiff if he was satisfied with him, to which plaintiff replied that he was perfectly; and Messrs. M. & D. thereupon agreed to pay the amount of the pilot's wages—\$5 per day. (*Id.*)

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3. The *May Queen* sailed from New York in the afternoon of Nov. 14, 1862. After having run into and remained in Absecon Harbor (80 miles from New York), on account of stress of weather, they continued the voyage on the afternoon of Nov. 17. When night came on, the weather had thickened and rain had commenced. The (coast) pilot was at the helm. The captain, mate, engineer and men had gone below to supper, leaving the pilot the only person on deck—there being no lookout. The pilot saw, on the starboard bow of his vessel, a single light. He took his glass and examined her. She was under sail, and showed but one light, and did not whistle, and the pilot concluded that she was a sailing vessel, as he had a right to, for vessels under steam should show more than one light, and are bound to whistle when approaching. He accordingly put the helm of the *May Queen* to starboard, to turn her away from the approaching vessel. She, however, proved to be the United States steam gun boat *Wam-sutta*; which, seeing the *May Queen* ahead, put her own helm to port. A collision occurred, by which the *May Queen* was lost.

Held by the general term, that the court below should have concluded from the testimony given that plaintiff was mistaken or forgetful of the specific terms of the contract about the pilot, and that in truth and fact, Duncan, acting as the agent of defendant, only agreed to *pay the expense or hire of the pilot* for the voyage, and upon such a conclusion the court should have dismissed the complaint upon motion, and the refusal so to do was error. (*Id.*)

4. But assuming that the court and jury were correct in their conclusion that defendant did contract with the plaintiff "to furnish a coast pilot for the voyage," and thereby incurred all the liabilities that would ensue from the use of those words, yet as a conclusion of law, such a contract did not make him responsible for the care and management and safe navigation of the vessel on the said voyage, but that the said pilot was received and placed upon said vessel, simply as a *pilot at sea*, to advise and direct the course of the vessel to her place of destination, subject to, and under the general authority and command of her master, who was the superior officer of such pilot during the whole voyage, and upon whom (the master) devolved the responsibility of the general care and management of such vessel during her voyage. (*Id.*)

5. The court below erred in its ruling, when it admitted testimony, objected to by defendant, of a usage or custom in regard to *coast pilots* having absolute and supreme control and management of a vessel on a voyage like this, as the superior of the master of said vessel (*Id.*)

6. Such control and management and the government and discipline of a vessel like this, engaged on such a voyage, should be determined as a question of law, and cannot be considered as a question of fact based upon custom or usage. This power and authority is clearly and unquestionably conferred upon and intrusted to the *master of the vessel* by the common, civil and maritime law, and he (the master) must be held responsible for its nonuse, or abuse, and he cannot evade that responsibility, nor shift the same from himself upon other persons by virtue of any custom or usage to the contrary. (*Id.*)

7. A claim for labor performed, and materials furnished upon and for the hull of a vessel, while in the process of construction before launching, is not a claim upon maritime contract, and not within the jurisdiction of the admiralty courts. The lien law of 1862 entitled "an act to provide for the collection of demands against ships and vessels," giving a lien on the vessel for such labor and materials, and providing for the enforcement thereof *in rem*, is, as to such contracts, constitutional and valid, and no infringement upon the federal maritime jurisdiction. (*Shepard* agt. *Steele*, 45 N. Y., 52.)

8. *In re Steamboat Josephine* (39 N. Y., 19), commented upon and distinguished. (*Id.*)

9. The act is not unconstitutional, as infringing upon the right of trial by jury. Liens were given in such cases, before the constitution of 1846, which were enforceable in equity without a jury. They are not, therefore, cases where, within that Constitution (art. 1, § 2), a trial by jury had therefore "been used." (*Id.*)

10. Where, within the twelve days after the vessel shall leave the port where the debt was contracted, an application shall have been made to the proper officer for an attachment, and the vessel shall have been seized under such attachment, and released therefrom by the giving of a bond in accordance with the act, it is immaterial to the right of action upon the bond, whether or not a specification of the claim shall have been filed within such twelve days. (*Id.*)

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11. Where a steamboat collides with a vessel aground in or near the channel of a navigable river, it will not relieve the colliding vessel from liability for the injury, that from some hidden and unforeseen cause, her bow was suddenly sheered directly toward the injured vessel when so near that, by the exercise of the utmost care and vigilance, the collision could not be avoided, when it also appears that, at the time the steamer's bow so sheered, her pilot, under an erroneous impression as to the true direction of the channel, was negligently steering her away from it, and out of the accustomed course. (*Austin agt. Steamboat Co.*, 43 N. Y., 75.)
12. A party cannot excuse himself upon the plea of inevitable accident, where, by his own negligence he has placed himself in a position which renders a collision unavoidable. He must exercise care and foresight to prevent reaching a point from which he is unable to extricate himself; and omitting these, the greatest vigilance and skill on his part subsequently, when the danger arises, will not avail him. (*Id.*)
13. Where it appears that the grounding of the injured vessel was caused by her running out of the accustomed channel (her pilot committing the same mistake as to the proper course that was afterward committed by the pilot of the colliding steamer), the negligence in so running her aground is not that "proximate" negligence contributing to the injury, which will prevent a recovery by her owners for damages occasioned by the subsequent negligence of those in charge of the steamer in running into her, when they had knowledge of her position, and that she was aground. (*Id.*)
14. Notwithstanding the previous negligence of those managing the grounded vessel, if, at the time when the injury was committed, it might have been avoided by the defendant, by the exercise of reasonable care and prudence, an action will lie for the injury. (*Id.*)
15. *Strout agt. Foster* (1 How. U. S. 89), commented upon and distinguished. (*Id.*)
16. It is not negligence in those in charge of a vessel aground to omit to give signals to approaching vessels as to which side of her is the proper course for them to take, even if such course is known to them. The customary signals from steam vessels by blasts of the steam whistle are to indicate the course which the vessel giving them intends, herself, to take, and are not therefore appropriate to be given by a steamer not in motion. (*Id.*)
17. Any State legislation providing for the enforcement of a maritime claim or contract except by common law remedy, infringes upon the exclusive jurisdiction of the federal courts, and is in violation of the federal Constitution. (*Brookman agt. Hamill*, 43 N. Y., 554.)
18. But as to claims, not in their nature maritime, against the owners of vessels, the State jurisdiction is complete, and there is no restriction upon its power to prescribe forms and methods of proceeding to enforce them. (*Id.*)
19. It is not material to the question of constitutionality, in any particular case, whether the admiralty courts do or do not proceed in such case *in rem*, but the test is the nature of the claim, whether maritime or otherwise. (*Id.*)
20. Ships and vessels, when within the territorial jurisdiction of the States, are not exempt from the operation of their laws for the collection of claims, or the creation or enforcement of liens not founded upon maritime contracts or torts; but as to the latter, the jurisdiction of the admiralty is, except as to mere common law remedies, and with the reservation as to inland lakes and rivers contained in the acts of Congress of 1845, exclusive in all cases, as well where they proceed only *in personam* as *in rem*. *Held*, accordingly, that claims for wharfage of a sea-going vessel are maritime in their nature, and the act of 1862 (chap. 482 of Laws of 1862), therefore, in so far as it provides for attachments and other proceedings *in rem* against vessels for such claims is void; and a bond given to discharge such an attachment cannot be enforced. (*Id.*)
21. *In re Steamboat Josephine* (39 N. Y., 19), explained and limited. (*Id.*)

W.

WAIVER.

See WARRANTY. (*Ante.*)

1. The party is to be presumed, after judgment, to have waived any objection that he might have taken on the trial, but omitted to take. (*Rue agt. Perry, ante*, 385.)
2. Neither the prisoner or his counsel can waive the presence of the former,

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on trial for a felony. (*Mauver* agt. *People*, 43 N. Y., 1.)

1. Upon a criminal trial, after the prisoner has pleaded "not guilty," it is within the discretion of the court to permit him to interpose a special plea, setting up defects in the organization of the grand jury which found the indictment, and a refusal to allow the plea cannot be alleged as error. (*People* agt. *Allen*, 43 N. Y., 28.)

4. A waiver, by the indorser of negotiable paper, of demand upon the maker, and of notice of non-payment, may be by implication from his acts, as well as by express words. (*Sheldon* agt. *Norton*, 43 N. Y., 93.)

5. And, accordingly, where the holder of a promissory note, just previous to its maturity having sought an interview with the indorser, shown him the note, and stated that "the maker wanted it to remain another year," asked him if he was willing. *Held*. (*CHURCH*, Ch. J., and *FOLGER*, J., *contra*), that the reply of the indorser that he was willing to let it remain, and that it was a good note, were a waiver of demand and notice at maturity, and their omission did not discharge the indorser.

6. *Held* further, that under these circumstances, the waiver was complete, independently of the question whether an agreement between the maker and holder for an extension for one year on the note was or was not made. In such case, the liability of the indorser becomes, by the waiver, absolute on the maturity of the note, and no subsequent demand and notice, at the expiration of the year of extension, or at any other time are necessary to fix him. (*Id.*)

See PLACE ON TRIAL. (*Id.*)
 AGREEMENT. (57 Barb.)
 APPEAL. (*Id.*)
 BOND. (*Id.*)
 INSURANCE. (FIRE.) (*Id.*)
 STREETS AND AVENUES. (*Id.*)
 LIEN (58 Barb.)
 PARTITION. (*Id.*)
 PRACTICE. (*Id.*)
 VENDOR AND PURCHASER. (*Id.*)
 EXECUTORS AND ADMINISTRATORS. (2 Lansing.)

WAREHOUSEMEN.

See CARRIERS. (57 Barb.)

WARRANTY.

1. The plaintiffs were manufacturers of

steel, and the defendants were manufacturers of axes. Plaintiffs wrote to defendants a letter, in which they offer to sell them ten tons of best cast steel, which they would warrant equal in quality to any brand of English cast steel. Defendants ordered the amount sent to them, which they made into axes, which proved to be of inferior quality, by reason of the inferior quality of the steel.

Held, that the referee was justified in finding a warranty that the steel would make as good axes as the best English steel. (*Park* agt. *Morris Axe and Tool Co*, ante, 18.)

2. The name of the defendant's company was "Axe and Tool Company." This was notice to the plaintiffs of the use to which the steel was to be applied, and the warranty must be held to be that the steel would make either axes or tools of as good quality as the best English. (*Id.*)

3. In this class of warranties the measure of damages is the difference between the value of the defective article, made from the defective material furnished, and the value of the article, if made from the material as represented. (*Id.*)

4. In other words, the measure of damages in this case, would be the difference in value between the axes made from the defective steel, and their value if the steel had been equal to the best of English steel. (*Id.*)

5. Where a written contract is entered into between the plaintiffs and the defendants by which the latter agree to rent to the plaintiffs a cattle barn connected with the defendant's distillery, for a certain time, and also agree to furnish to the plaintiffs, at the barn, slops from the distillery—One hundred and eighty-three bushels of slops per diem, during the term; and the plaintiffs agree to pay for the slops and the rent of the barn, at the rate of nine cents per bushel of the slops furnished, which agreement is carried into execution by the parties according to its terms:

2. The contract is not one to manufacture or furnish a manufactured article, in the sense that in every sale and purchase of an article to be manufactured, there is an implied warranty that the article, when delivered shall be of a merchantable quality; nor does an article, designated no otherwise than as "slops from their distillery," constitute a manufactured article within the meaning of the rule which implies

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a warranty of merchantable quality. (*Holden* agt. *Clancy*, ante, 1.)

3. Consequently, an objection made by the plaintiffs pending the contract, that the defendants were buying and using in their distillery damaged grain or grain which had been scorched and injured by fire during the burning of an elevator in which it was stored, the slops from which were injurious to the plaintiff's cattle which they were fattening, could have no force or effect in reference to a recovery upon an implied warranty of the value of the slops. (*Id.*)

4. It is not reasonable to suppose that in contracts for the sale of this refuse material, it is the expectation of either that the manufacturer is to be controlled in his choice of material or machinery to be used, by any consideration as to the effect which it may have upon the value of the refuse material resulting from the process. (*Id.*)

5. And it seems absurd to suppose there can be in the absence of express contract or of fraud or imposition, any responsibility for the quality of what is sold as slops or swill. The plaintiffs had what they bargained for, "slops from the distillery," and it would seem reasonable to apply to such a case, the doctrine of *caveat emptor*. (*Id.*)

6. But if there were a warranty of merchantable quality implied in such a case, the plaintiffs would not be entitled to recover in this case, since it appeared that they received and consumed the slops from day to day, with a full knowledge of their quality, and without returning or offering to return them, or giving the defendants notice to take them away or deliver any more. This was a complete waiver of the alleged defects. (*Id.*)

See FRAUD. (57 Barb.)

7. The general covenant, to warrant and defend premises conveyed, against all lawful claims, includes the covenant for quiet enjoyment; and the true meaning of it is that the grantee and his heirs and assigns shall not be deprived of possession by force of a paramount title. It runs with the land, and passes with the fee to any subsequent grantee of the same title. (*Rivelskop* agt. *The Farmers' Loan and Trust Co.*, 58 Barb., 36.)

8. Such a covenant, it is well settled in this state, is only broken by actual eviction from the premises. Where there has never been any possession under

or through the deed containing the covenant, there can be no actual eviction. (*Id.*)

9. Where, at the date of a deed, the premises granted are in the possession of other persons claiming adversely to the grantee and his grantor; and such persons and others claiming under them are permitted by the grantee, and those deriving title from or through him, to remain undisturbed until their adverse possession ripens into a good title, as against the grantee, the latter, or one claiming under him, cannot be allowed to recover upon the covenant of warranty, for a failure of title by such means; they not having lost their land by a title paramount, existing at the time of executing the covenant, but by their own laches, in suffering an imperfect and inferior claim of title to become a legal title paramount to theirs. (*Id.*)

See AGREEMENT. (*Id.*)

INSURANCE. (*Id.*)

PRINCIPAL AND AGENT. (*Id.*)

VENDOR AND PURCHASER. (*Id.*)

WATCH.

1. Not a "jewel" or "ornament" under innkeepers' statute of 1855. (*Ramaley* *Leland*, 43 N. Y., 539.)

WATER.

1. The owner of land through which a stream of water naturally flows has the right to use the water there in any manner he may see fit, so that he does not interfere with the rights of other owners to the use of the water, on the stream below, or above. (*Pollitt* agt. *Long*, 27 Barb., 20.)

2. This right to use the water is incident to the ownership of the land through which the stream naturally flows, and pertains alike to every owner of the soil. (*Id.*)

3. And even if an owner has an interrupted flow and use of a stream on his own land, for twenty years or more, he does not thereby acquire such a prescriptive right to such uninterrupted flow and use that he can prevent an owner of land on the stream above from using and enjoying the water on his land in any reasonable and proper manner. (*Id.*)

4. Yet an owner above may acquire a right, by prescription, to detain and obstruct by flow of water, to an acce-

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tomed extent and for a fixed period, against the owners below. (*Id.*)

5. The right to water flowing through land is the right of use only; and this is a right belonging to each owner, in common with every owner of the land through which the stream naturally flows. No one owner can divert it from the land of another, or obstruct and detain it to the injury of another, without rendering himself liable in an action, to recover damages, or to obtain such other relief or remedy, as the particular case may call for. (*Id.*)

6. All that the law requires of the party, by or over whose land a stream passes, is that he shall use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish, or affect the application of the water, by the proprietors below, on the stream. He must not shut the gates of his dam, and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbors. (*Id.*)

7. Where the defendant, the owner of a mill situated above the factory of the plaintiffs, upon the same stream, had been in the habit of keeping his gates closed through several of the working hours of each day, and for that time depriving the plaintiffs wholly of the use of the water for their factory, and then let it off in such unusual quantity that the plaintiffs could only use a small portion of it, while passing, when, without such intention, they would have been able to run their factory constantly, and without interruption:

Held, that this conduct of the defendant was clearly unjustifiable, and gave the plaintiffs a good right of action, at least to recover damages for the injury occasioned by the detention. (*Id.*)

8. *Held*, also, that this was a proper case for the preventive remedy by perpetual injunction. (*Id.*)

9. Since the Code, it is unnecessary, as a preliminary to that species of relief, to settle the right by any action at law, even where the right is doubtful. (*Id.*)

10. The true measure of damages, in such a case, is the value of the use of the water to the plaintiffs, situated as they were, during the time they were wrongfully deprived of it. (*Id.*)

11. Where, in such an action, the plaintiffs were allowed to prove how many yards of cloth less they made, in consequence of the detention of the water

by the defendant; than they could have made had the water not been detained as it was, and what the profit on each yard manufactured and sold was, at the price at which they sold what they did make:

Held, that this was clearly incompetent for the purpose of ascertaining the amount of damages sustained by the plaintiffs; it being wholly speculative and conjectured. (*Id.*)

12. Every person has the right to drain the surface water from his own land to render it more wholesome, useful or productive, or even to gratify his taste or will; and if another is inconvenienced, or incidentally injured thereby, he cannot complain. (*Waffie* agt. *New York Central Railroad Company*, 53 Barb., 413.)

13. No one can divert a natural water course or stream, through his land to the injury of another, with impunity; nor can he by means of drains or ditches throw the surface water from his own land upon the land of another, to the injury of such other. (*Id.*)

14. But where a person can drain his own land without turning the water upon the land of another, or where it can be done by drains emptying into a natural stream and water course, there can be no doubt of his right thus to drain, even though the effect may be to increase the volume of water unusually at one season of the year, or to diminish the supply at another. (*Id.*)

15. No one can be required to suffer his land to be used as a reservoir, or water-table, for the convenience or advantage of others. (*Id.*)

16. The owner of land through which a stream flows may increase the volume of water by draining into it, without any liability to damages by a lower owner. He must abide the contingency of increase, or diminution of the flow in the channel of the stream, because the upper owner has the right to all the advantages of drainage or irrigation, reasonably used, which the stream may give him. (*Id.*)

16. The plaintiff owned a saw-mill, upon a small stream nearly two miles below the point where the defendant's road crossed such stream. At that point, the land was naturally low and marshy, and defendant, in constructing its road, raised the bed thereof above the natural surface of the land, by excavations on each side, leaving ditches, by means of which the surface water was drawn off and passed into this

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stream on each side of the road-bed, where the stream was crossed by the road. Such ditches were wholly upon the defendant's land, and conducted the surface water into the stream upon its own land. The complaint alleged, and the testimony tended to prove, that by means of these ditches the water from such low land was drawn off and led into the stream so rapidly that in times of flood and high water, it filled the plaintiff's pond so full that he could not use the same, but was compelled to open his gates and let the water flow through; and that in a dry season the supply of water in the stream was, by the same means earlier exhausted, and the plaintiff's mill thereby compelled to lie idle and unemployed, for want of water, for a much longer period than formerly;

Held, that these facts constituted no cause of action; and that the plaintiff was properly non suited. (*Id*)

WATER PRIVILEGE.

See DEED. (2 *Lansing*)

WHARFAGE.

1. Claims for, against sea-going vessels are maritime claims, and subjects of admiralty jurisdiction. (*Brookman* agt. *Hamill*, 43 *N. Y.*, 554.)

WILL

1. Where the testator, by his will, required his executors to pay to a trustee \$4,000 to be invested in the best manner, and the interest to be paid by him, semi-annually to the plaintiff during her life, and at her decease to pay the principal to her heirs. (*Pierce* agt. *Chamberlain*, ante, 501.)
2. And then directed his executors to pay the legacies mentioned in his will as fast as they might be able to do so without sacrificing his estate, but to pay all except such as were directed to be paid at a future day, within two years after the period of his decease:

Held, that the plaintiff was entitled to the benefit of her legacy, and consequently the interest thereon, from the period of the testator's decease. There was to be no such conversion of one species of property into another, as under the authorities would lead to a postponement of that benefit for any period of time whatever. (*Id.*)

3. An executory bequest limited to the use of a corporation to be created within

the period allowed for the vesting of future estates and interests is valid. (*Burrill* agt. *Boardman*, 43 *N. Y.*, 254.)

4. Where a testator bequeathed the residue of his estate to nine trustees, for the establishment of an hospital for the reception and relief of sick and diseased persons, and directed them to apply to the legislature for a charter to incorporate the same; and in case the legislature should refuse to grant the same within two years next after his death, provided two lives named in his will should continue so long, then the trustees were to pay over the same to the United States. *Held*, that the provisions did not violate the statute of perpetuities, but that the corporation could take only in case the charter was granted within two years. (*Id.*)
5. *Held*, further, that the bequest was not void on account of the uncertainty of the beneficiary. (*Id.*)
6. *Quere* as to the validity of the contingent bequest over to the United States. *CHURCH*, Ch. J. (*Id.*)
7. Where, by a will, shares or interests in real or personal estate, to be ascertained by a division or sale, are given, the estate or interest of each devisee or legatee in the property to be divided or converted is a vested interest before the conversion or division, and takes effect in actual enjoyment, as soon as the time appointed for the division or sale arrives. (*Manice* agt. *Manice*, 43 *N. Y.*, 303.)
8. Limitations over, to take effect in case of the death of any such devisee or legatee prior to the division, refer to the time appointed for the division, and not to the period of its completion, unless the language of the will clearly and unequivocally expresses an intention that the vesting of the estates or interest of the donees shall be postponed until such completion. (*Id.*)
9. If such intention is clearly and unequivocally expressed, effect must be given to it. But such intention will not be imputed to the testator, if it can be avoided. (*Id.*)
10. A general devise to executors in trust vests no estate in them, except for such of the declared purposes as require that the title be vested in them. (*Id.*)
11. The testator devised and bequeathed all his residuary real and personal estate to his executors in trust, to receive the income and to apply it according to

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the directions of the will, during the life of the testator's widow; upon her death, to sell certain lots, and cause the residue of the estate to be appraised by three appraisers, one of whom should be chosen by the surrogate of the City of New York; to divide the whole into twelve equal parts; to convey, transfer and pay over to the testator's son W., in fee simple, to whom he gave, devised and bequeathed the same, or, in case of his death to his then living lawful issue, three of said parts; to convey, etc., to the testator's son E., in fee simple, and bequeathed the same to him, or in case of his death prior to the time of such distribution, to his then living lawful issue three other of said parts; to retain and hold as trustees under said will, and he gave, devised and bequeathed the same to them accordingly, two other of said parts in trust, to invest, lease, etc., and receive the income, etc., and apply it to the use of his daughter M., during her life, with remainders over after he decease. He created like trusts as to two other shares of two-twelfths each, for the benefit of his two daughters C. and F. respectively.

Held that the shares of each of the sons and daughters should include certain real estate, specifically described, at its appraised value: that in case of the decease of either of his said sons prior to such division, leaving no lawful issue living at the time of such division, the surviving son, or in case of his death, his lawful issue then living, should take the share of the deceased son; and that in case of the death of either of the daughters previous to the time of distribution, the trustees should retain her share upon certain trusts for her issue.

Held, that the estate of the trustees under the general residuary devise would terminate upon the death of the widow.

That the trust to receive the rents, &c., would cease with the trusts to apply them.

That the trust to sell vested no estate in the trustees.

That the trusts to appraise, divide and convey, were unauthorized as trusts; but could be executed as powers.

That upon the death of the widow the devise to the sons and trustees for the daughter respectively, would immediately take effect in actual enjoyment.

That the trusts to sell, appraise and

divide, did not suspend the power of alienation of the real estate or the absolute ownership of the personal property; but that from the time of the death of the widow and pending the division, the sons, and the trustees for the daughters, would be entitled to the possession and enjoyment, as tenants in common, of the individual property subject to the power of sale and division.

That the limitations in case of death of sons or daughters, "prior to the time of such distribution," or "prior to such division," or "previous to the time of distribution," referred to the time appointed for the division, viz., the death of the widow.

That the sons, or their issue then living, would take the shares which were given absolutely, and the daughters, or their issue then living, would take the beneficial interest in the shares given in trust. (*Id.*)

12. A remainder in fee in real estate, to take effect after the expiration of two lives in being, at the testator's death, may be created in favor of a person not in being at that time: and in such a case a further contingent remainder in favor of a person not in being at the creation of the estate may be limited, to take effect in the event that the person to whom the remainder is first limited shall die under the age of twenty-one years. (*Id.*)

13. The testator created trusts of real and personal property, to receive the income apply it during the life of his widow, and, upon her death, to divide the property into shares; and as to the share of each daughter, to receive the income, and apply it to her use during her life, and after her death to divide her part into as many shares as there should be children of such daughter living at the time of her death, and to retain one of such shares for each of said children, and accumulate the net income thereof during his or her minority, and, on his or her arriving at age, to pay the same over to him or her, with its accumulations, with contingent limitations over of the shares of any such children who might die during minority:

Held, that these contingent remainders and the trusts for accumulation, were valid as to the real estate and void as to the personality.

That the failure, as to the personality, of these trusts for accumulation during the minority of the testator's grand-

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children, of the contingent limitations over in case of their death in infancy, did not invalidate the other dispositions of the will.

That the effect of declaring them void would be to vest the personality absolutely in the children of each daughter on the death of their mother.

That a void trust, which is separable from other valid trusts, may be cut off, where the trust thus defeated is independent of the other dispositions of the will and subordinate to them, and not an essential part of the general scheme. (*Id.*)

14. The testator directed that during the lifetime of his widow, a portion of the income be distributed by the trustees to his widow and five children, and that the rest be accumulated to swell his residuary estate:

Held, that except as to this accumulation, the trust was valid.

That a trust to apply rents, &c., to the use of more than two beneficiaries is valid, if it is limited in its duration to the life of one of them.

That the direction for accumulation being void, the portion of the income directed to be accumulated became immediately payable to the persons presumptively entitled to the next eventual estates in the corpus or principal.

That, the widow being still living, these were the sons, in their own right, and the daughters, through their trustees, and the issue of one of the daughters who had died.

That such issue were also entitled to the portion of the income payable under the will, to their mother during the lifetime of the testator's widow.

That they took it as income, not legally disposed of, accruing from the share in which they presumptively had the next eventual estate.

15. The husband of the deceased daughter, and administrator of her estate, was properly required to give security before receiving the arrears of accumulations and income due to his wife at the time of her decease, he being a resident of Connecticut, and she having been domiciled there at the time of her decease, and the husband being, by the laws of that state, entitled only to a life estate in her personal property. (*Id.*)

16. The testator made a bequest of \$5,000, which he directed paid to the

treasurer, for the time being, of Yale College, accompanied with a request that the trustees of the college invest it and accumulate the income until the principal and interest should amount to \$30,000, and thereafter apply so much of the interest, when required to do so, as would educate continuously one person who should bear the testator's paternal name, and be a lineal descendant of his, in all their courses, collegiate and scientific.

The college being authorized by its charter to take, this bequest was sustained as a valid bequest of \$5,000 to the college; and the questions whether the request created a trust, and whether if it did, such trust was legal, were left to the courts of Connecticut, where the fund was to be administered. (*Id.*)

17. The existence of corporations organized under the laws of a sister state is recognized by the courts of this state, and they may take personal property under wills executed by citizens of this state, if by the laws of their creation they have authority to acquire property by bequest. (*Chamberlain v. Chamberlain*, 43 N. Y., 424.)

18. The law of the testator's domicile controls as to the formal requisites essential to the validity of the will, the capacity of the testator, and the construction of the instrument. (*Id.*)

19. When, by the *lex domicilli*, a will has all the formal requisites to pass title to personality, the validity of particular bequests will depend upon the law of the domicile of the legatee, except in cases where the law of the domicile of the testator in terms forbids bequests for any particular purpose, or in any particular manner in which latter case it would be void everywhere. (*Id.*)

20. For the purpose of ascertaining the estate, only half of which can be willed to charitable or educational corporations, under the act of 1860, the widow's dower and the debts are to be first deducted. (*Id.*)

21. A testator cannot give to two or more corporations in the aggregate more than he can give to a single object, viz., one-half of his estate. (*Id.*)

22. Under a condition requiring the devisee or legatee (the widow as well as others) to renounce all claim to any share or interest in the estate other than as given by the will, without exception, the court cannot except from the operation and effect of the condition any part of the estate, although in

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attempted disposition by other clauses in the will is held invalid. (*Id.*)

23. When the invalidity of a gift to a particular purpose or trust renders substantially ineffective the other provisions of the will in reference to the same purpose, the latter must fall with the former, but whenever the purpose of the testator can be carried into effect as to a valid provision, the invalidity of others will not affect it. *Adams* agt. *Perry*, 43 N. Y., 487.)

See CHARITABLE DEVICES AND BEQUESTS. (*Id.*)
DEVISE. (*Id.*)
LITERARY CORPORATIONS. (*Id.*)
TRUSTS AND TRUSTEES. (*Id.*)

24. A gift by will to an executor of a sum of money, as a compensation for his services as such, over and above his commission, stands in the same position and partakes of the same character, as the commissions of an executor. It is not an absolute gift and not such a devise or legacy, as becomes forfeited under the statutes (2 R. S., 65, § 50), by the legatee becoming a subscribing witness to the execution of the will (*Pruyn* agt. *Brinkerhoff*, 57 Barb., 176.)

25. Nor a devise of real estate in trust to make partition, and for various special purposes, or a gift of personal estate in trust, forfeited by the devisee or legatee becoming a subscribing witness. (*Id.*)

26. Whether the above statutory provision is superseded and amended by section 399 of the Code of Procedure? *Quære. (*Id.*)*

27. A testator, by the third clause of his will, gave and bequeathed to his executors the sum of \$20,000 in trust to invest the same and keep it invested, and from the income to pay to his brother and sister \$500 each, during their respective lives, and to pay annually the residue of the income to the general synod of the Reformed Protestant Dutch Church, to be applied to the support and education of pious, indigent young men preparing for the ministry; and upon the decease of either his said sister or brother, to pay annually the whole residue of said income, after paying \$500 annually to the survivor, to the said general synod, to be applied as before mentioned; and, upon the decease of the survivor, to pay said principal sum of \$20,000 to the said general synod, to be applied as before stated. By the fifth clause the testator gave the residue of his

estate to the said general synod, "to be applied to the support and education of pious, indigent young men preparing for the gospel ministry in that church."

Held, 1. That so far as the fifth clause of the will was concerned, the law of trusts had no application; there being but one trust created by the will, viz., the one mentioned in the third clause, upon which there was no question, and the only relevancy of which was, so far as it tended to confirm the view that the fifth clause did not, and was not intended to, create any trust. 2. That the third clause showed that the testator was well advised as to the proper language to be employed when the bequest was to be held in trust; and that the fact of his not using similar phraseology in the fifth clause, only went to show that the devise therein mentioned was not intended by him to be construed otherwise than, by its term, he had expressed it. 3. That the purpose avowed, in the fifth clause was, in the highest and holiest sense, both religious and charitable; and the devise was absolute in its terms; no condition whatever being imposed. 4. That as the fee vested absolutely in the synod, there could be no doubt of the validity of this provision of the will. 5. That the question whether the property, with that which the synod already held, would exceed in amount the sum to which its charter restricted it, could not be tried in an action brought by the executors, for the construction of the will. That that question was not to be determined collaterally, but only in a direct proceeding by the state. 6. That the condition imposed in the act incorporating the synod being, not against its *taking*, but against taking and holding, the corporation could *take*; but whether it could *hold*, was another question, not necessary or proper in its collateral way to be considered—a question purely of public policy, with which individuals had no concern, but in which the state, as the sovereign, was alone interested, and which it might either raise or waive, according to its pleasure. (*Kearney* agt. *Laing*, 58 Barb., 453.)

28. Unless the testator declares, or gives the witnesses in some form to understand, at the time of making or acknowledging his subscription, that the instrument signed is his will, there is no sufficient publication. (*Bagley* agt. *Blackman*, 2 Lansing, 11.)

28. Accordingly, where the witnesses had been sent for to witness the testator's will, and went for that purpose,

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but had no other information that they were witnessing his will:

Held, that the publication was insufficient (*Id*)

30. A will was executed in the presence of the draftsman, a person accustomed to drawing such instruments and of two instruments, in the following manner: The testatrix signed the instrument in the presence of the witnesses, and in response to a question put by draftsman, acknowledged it to be her last will; the draftsman then said to one of the witnesses, "now Mr. W.," and, handing him the pen, the latter signed the attestation clause, which was full, and handed the pen to the other witness, who also signed in like manner. The will was in possession of the testatrix at the time of her death:

Held, that it was duly published and executed. (*Smith* agt. *Smith*, 2 *Lansing*, 266.)

See DEVISE AND BEQUEST. (*Id*.)

WITNESS.

1. The change in the law, which allows parties to be witnesses, has not changed the rule that the execution of an instrument under seal must be proven by the subscribing witness. (*Hodnett* agt. *Smith*, *ante*, 190.)

2. Consequently, where the attendance of the subscribing witness cannot be had, proof of due diligence, such as would govern a prudent man in a sincere search for the witness, is still necessary. (*Id*.)

3. If such proof be satisfactory, the signature of the witness may be proven; and when it appears that this cannot be done, and not before, proof may be given of the handwriting of the party who executed the instrument. (*Id*)

4. A party to an action may be compelled to attend for his examination before a judge, as a witness, under section 391 of the Code, in whatever county he is served with a summons and notice to attend for such examination, although he be a resident of another county. (It seems that this section of the Code should be amended in this respect, as it may operate oppressively and prejudicially to the party to be examined in many cases.) (*Todd* agt. *Lambden*, *ante*, 230.)

5. On the trial of the prisoner for grand larceny, the wife of the prosecutor having given material evidence in behalf of the people on her direct exam-

ation by the district attorney, fainted away, and went into convulsions immediately after such direct examination was closed, and before the prisoner had any opportunity of cross-examining her, and so remained till the close of the trial:

Held, the court having refused either to strike out her testimony, or adjourn the trial until she should become able to bear cross examination, or to discharge the prisoner, that it was erroneous to permit her evidence to go to the jury. (*People* agt. *Cole*, 43 *N. Y.*, 509.)

6. It is error to suffer to go to the jury any evidence given by a witness on direct examination for the people, where by sudden illness or by death of such witness, or other cause without the fault of and beyond the control of the prisoner, he is deprived of his right of cross-examination. (*Id*.)

7. In a partition suit between the children of the husband by his first wife, and his children by a woman claiming to have been his second wife, the latter is a competent witness in behalf of her children to prove their legitimacy. (*Van Tuyl* agt. *Van Tuyl*, 57 *Barb.*, 235.)

8. The fair construction of section 399 of the Code of Procedure is, that when adverse rights by succession are involved, one litigant shall not testify to a transaction with the deceased predecessor in title, invalidating or impairing the right or title of the other. (*Id*.)

See EVIDENCE. (*Id*)

OPINIONS OF WITNESSES. (*Id*.)
PRACTICE. (*Id*.)

9. In an action brought against the writer of letters, by the administrator of the persons addressed, the defendant is an incompetent witness, under § 399 of the Code, to prove that the letters were written, or that they were received and retained by the person addressed. (*Ressequie* agt. *Mason*, 58 *Barb.*, 89.)

10. His testimony is incompetent, as relating both to a "transaction" and "communication" between the party testifying and a deceased person, whose claims against such party are the subject of the litigation. (*Id*.)

11. The provisions of section 399 of the Code relate as well to written as to verbal communications. (*Id*.)

12. Where the object of questions put to a witness, on cross-examination, is to test his memory, the allowance thereof

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is a matter within the discretion of the referee. (*Terry* agt. *McNiel*, 58 *Barb.*, 241.)

13. Where the defendant had previously been called as a witness in his own behalf, and had testified to an examination of certain account books of the plaintiff's intestate and the entries therein, and had impeached such entries as to an omission of credits to himself:

Held, that it was competent to impair this testimony in all possible legal ways, and to impeach the memory of the witness as to such books, and the entries therein, by their production; and to do this by the testimony of the plaintiff, with whom the defendant had examined them. (*Id.*)

14. A medical expert, called as a witness is not qualified to express an opinion based on previous testimony in the case, where he has not heard all the testimony which may have been material to the subject of inquiry. (*Carpenter* agt. *Blake*, 2 *Lansing*, 206.)

15. In an action against a surgeon for the negligent and unskillful treatment of a dislocated arm, the defendant "claimed consecutive luxation" or displacement after an actual reduction.

Held, that it was not competent to ask a surgical witness, who had heard the testimony of surgeons and others having knowledge of the injury and condition of the arm, whether from the facts sworn to, he believed there had been "consecutive luxation." (*Id.*)

16. And, a question of this character to

be admissible, must be a hypothetical one, based either upon the hypothesis of the truth of all the evidence given in the case, or upon an hypothesis, specially framed, of certain facts assumed to be proved for the purpose of the inquiry. (*Id.*)

17. A witness called by the prosecution on the trial of a criminal action, upon a direct examination, gave material testimony against the prisoner but a cross-examination was rendered impossible by reason of her sudden illness:

Held, the prisoner's counsel objecting, and claiming to have it stricken out, that it was error to submit such a testimony so given to the jury. (*Cole* agt. *The People*, 2 *Lansing*, 370.)

18. Where the right to cross examine is lost without fault, or waiver by the party entitled, the testimony of the witness should be stricken out. (*Id.*)

19. The case of *Forrest* agt. *Kissam*, (7 *Hill*, 463,) distinguished, and some of the dicta therein disapproved. (*Id.*)

See EVIDENCE. (*Id.*)
JURY AND JURY TRIAL. (*Id.*)
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WORK AND LABOR.

See BILLS OF EXCHANGE AND PROMISSORY NOTES. (2 *Lansing*.)
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21, 1871.

Judgment affirmed with Costs.

Elwood agt. The Western Union Telegraph Co.
Crater agt. Bininger.
Cahill agt. Palmer, and the Mayor of N. Y.
Selover agt. Misner.
Bordwell agt. Colie.
Mills agt. The Michigan Central R. R. Co.
Field agt. Pierson.
Parsons agt. McIntosh.
Chapman agt. Collins.
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Kinnear agt Kinnear.
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Cox agt. James.
Smith agt. The N. Y. Central R. R.
Perine agt. Hotchkiss.
Cassidy agt. De Le Fevre.
Yenni agt. McNamee.
Owen agt. The Farmer's Joint Stock Ins. Co.
Macklise agt. The New Jersey Steam Boat Co.
Cuddihy agt. Hudson River R.R. Co.
Relyea agt. Reif.
Barrett agt The Third Avenue R. R. Co.
Woodin agt. Austin.
Wood agt. Van Santvoord.
Atkins agt. Elwell.
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Pomeroy agt. Shaw.
Conklin agt. The Second National Bank of Oswego.
Warring agt. The Indemnity Fire Ins. Co
Bigelow agt. The Erie Railway Co.
Anderson agt. Brower.

Decisions Court of Appeals.

Oddie agt. The National City Bank of N. Y.
Eddy agt. The N. Y. Central Railroad.
Barker agt. Doty.
Frisber agt. Caldwell.
The New Haven and Northampton Co. agt. Quintard.
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The Ocean National Bank of N. Y. agt. Olcott.
Holden agt. The Putnam Fire Ins. Co.
Duffy agt. O'Donnevan.
Hough agt. The American Baptist Missionary Union.
Richardson agt. The N. Y. Central R. R. Co.
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Hoffman agt. Hoffman.
Crocker agt. Colwell.
McCarthy agt. The City of Syracuse.
Haight agt. Williams.
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Grand Trunk Railway of Canada agt. Edwards.
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Garvey agt. Jarvis et al.
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Lass and another agt. Wetmore.
Cook agt. Gregg.
Bishop agt. Ferguson.
Wood agt. Northwestern Insurance-Co.
Goss agt. Mather.
Stewart agt. Drake.
Sturges agt. Bissell.
Hill agt. Day.
Williams agt. Serjeant.

Judgment affirmed, without cost.

People ex rel. Davis agt. Gardner.

Decisions Court of Appeals.

Lanel agt. Van Wagenen.

Lanel agt. Van Wagenen.

Judgment Reversed, New Trial Granted, Costs to abide event.

Bradley agt. The Mutual Benefit Life Ins. Co.

Harsha agt. Reid.

Wallman agt. The Society of Concord.

Nelson agt. Odiorne.

Gibbons agt. Wood.

Root agt. The Great Western Railway Co.

Reed agt. The N. Y. Central Railroad Co.

Fordred agt. The Seaman's Bank for Savings of N. Y.

Levy agt. Brash.

The Atlantic Dock Co. agt. Libby.

Maghee agt. The Camden and Amboy Railroad and Transportation Co.

Pooler agt. Pooler.

Smith agt. Duchardt.

Oswald agt. Moat.

Bridger agt. Pierson.

Gorton agt. The Erie Railway Co.

Baldwin agt. The U. S. Telegraph Co.

Hunt agt. Roberts.

Mattoon agt. Young.

Bostwick agt. The Baltimore and Ohio R. R. Co.

Sandford agt. Sandford.

The Manhattan Brass and Manufacturing Co agt. Spears.

Robinson agt. Weil.

Drew agt. Swift.

Hall agt. Sanderdale.

Grant agt. Smith.

Hart agt. Messenger.

Hamilton agt. Douglas.

The Madison Avenue Baptist Church agt. The Baptist Church in Oliver Street.

The Aetna National Bank of N. Y. agt. The Fourth National Bank.

Fordham agt. Smith.

Duncan agt. Berlin.

Wohler agt. The Buffalo and State Line R. R. Co.

Miller agt. The Buffalo and State Line R. R. Co.

Warner agt. Warren.

Collins agt. Bennett.

Wood agt. Lafayette.

White agt. Corlies.

Hutchings agt. Miner.

Butterworth agt. Crawford.

Rodermond agt. Clark.

Acer agt. Westcott.

Allis agt. Leonard.

Riley agt. The City of Brooklyn.

Judgment affirmed, with costs to the Respondents, to be paid by the Plaintiffs from the estate of the Testator.

White agt. The American Colonization Society.

Decisions Court of Appeals.

White agt. The Trustees of the Board of Domestic Missions.

White agt. The American Tract Society.

Order affirmed with costs.

People ex rel. Crandall agt. The Board of Supervisors of Alleghany County.

In the matter of widening 15th street and 9th ave., Brooklyn, and Park Commissioners, agt. Nichols.

In the matter of the petition of Eager to vacate an assessment.

People ex rel. McLean and others agt. Flagg and another.

Appeal dismissed with costs.

Turnbull agt. Martin.

Abbott agt. The Metropolitan Insurance Co.

Hiler agt. Stokes.

Ackerman agt. Bussing.

Medbury agt. Swan.

Gannon agt. Keenan.

Foster agt. The Townsend Manufacturing Co.

Wright agt. Hunter.

Carey agt. Grant.

Judgment affirmed by default.

Gadeke agt. Lahey.

Marsh agt. Palmer.

Van Tile agt. Kidd.

Anderson agt. Hill.

Churchill agt. Bradley.

Johnson agt. Swart.

Beardsley agt. Davis

Mackey agt. Mackey

Order granting new trial affirmed, and judgment absolute for defendant with costs.

Chamberlain agt. Parker.

Home Life Insurance Co. agt. Sherman.

Davis agt. Lottich

Klink agt. Colby and another.

Order granting new trial reversed and judgment on report of referee affirmed, with costs.

White agt. Smith.

Judgment reversed and judgment in favor of the defendant, with costs.

The National Park Bank of N. Y. agt the Fourth National Bank of N. Y.

Judgment reversed and judgment ordered for defendants in case, with costs.

Weed agt. Barney.

Judgments affirmed, without costs in this court to either party, as against the other.

Spencer agt. Carr.

Decisions Court of Appeals.

Judgment reversed except as to one penalty, and affirmed for one penalty, with costs included in the judgment, and without costs in this court to either party as against the other.

Sturgis agt. Spofford.

Order granting new trial affirmed, and judgment absolute for the defendant with costs pursuant to stipulation.

Wells agt. White.

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Kelsey agt. The Northern Light Oil Co. of N. Y.

The Bank of Albion agt. Burns.

Motion to vacate order dismissing appeal denied, with \$10 costs.

The Superintendent of the Poor of Kings Co. agt. Bostwick.

Orders of the General and Special Terms of the Supreme Court, reversed, so far as they strike out the general denial of the first answer and direct judgment for the plaintiffs in the action and order a reference to take an account, &c., and modified so far as they hold the plaintiffs entitled to judgment on the second defense set up in the answer as frivolous and strike out the last paragraph of the first defense; and ordered that the second defense set up in the answer and the last paragraph of the first defense be stricken out as irrelevant. Order of the Supreme Court except as thus modified or reversed, affirmed, neither party to have costs of the appeal to this Court as against the other.

Thompson agt. The Erie Railway Co.

Motion to re-instate cause granted on payment of \$10 costs of opposing.

East N. Y. and Jamaica agt. Elmore R. R. Co.

Motion for a modification of order and a re-hearing denied, with costs.

Elwood agt. Gardner.

Order granting New Trial affirmed judgment absolute for plaintiff with costs, pursuant to stipulation.

The Minnesota Central Railway Co. ag. Morgan.

Bullymore agt. Cooper.

Judgment reversed and judgment for plaintiff on demurrer, with costs, and with leave to defendants to withdraw demurrer and answer complaint on payment of costs, within twenty days after filing remittitur in the Supreme Court and making this judgment the judgment of that Court.

McHenry agt. Hazzard.

Motion to dismiss appeal denied without costs, and Clerk of Supreme Court directed to return the papers used upon motion to substitute Gertrude A. Hackett, Executrix, &c., plaintiff, as per draft order filed.

Hackett agt. Belden.

Decisions Court of Appeals.

Order affirmed without costs of this appeal to either party.

The Erie Railway Co. agt. Ramsey.

Judgment modified and plaintiff declared entitled to a satisfaction of the judgments on paying the amount due thereon after deducting \$500, the interest of C. D. Miller therein and interest on said amount, and as thus modified, judgment affirmed without costs in this court to either party as against the other.

Beers agt. Hendrickson.

So much of the judgment as dismisses the complaint with costs, reversed, and a new trial ordered, costs to abide event.

Bliss agt. Greeley.

Orders and Judgments of the Supreme Court modified as follows: The 1st answer stricken out as irrelevant, the motion to strike out the 2d answer denied, the judgment of the General Term on the demurrer to the 3d answer reversed and that of the Special Term, and judgment for the plaintiff therein, neither party to recover costs in this Court against the other.

Newman agt. The Board of Supervisors of Livingston Co.

Judgment modified in accordance with opinion, and to be settled by Judge ALLEN, not notice without costs in this Court to either party as against the other.

Buchanan agt. Comstock.

Motion to dismiss appeal denied with \$10 costs.

Heineman agt. Spencer.

Appeal dismissed with costs of motion.

Duncan agt. Baile.

McMillen agt. Rindskopf.

Appeal dismissed by default.

Blair agt. Bennett.

Order and judgment of this Court modified by striking out the words "with costs included in the judgment," so that it shall read "judgment reversed except as to one penalty, without costs to either party against the other in this Court."

Sturgis agt. Spofford.

Motion to dismiss appeal granted without costs.

Lighthall agt. Bander.

McMurray agt. McMurray.

So much of the judgment as gives costs and allowances to the plaintiff reversed, and the residue of the judgment affirmed without costs to either party as against the other.

Morris agt. Wheeler.

Bart agt. Wheeler.

Decisions Court of Appeals.

Judgment reversed and new trial granted, costs to abide event, unless the plaintiff stipulates to reduce the judgment to \$100, and interest from March 11th, 1868, and in case the judgment is so modified and reduced, then affirmed for that amount without costs to either party as against the other.

Rolland agt. Cross.

Return sent to the Court below with leave to the appellants to move for re-argument or other relief in that Court, and if motion denied, then return to be sent back to this Court.

Rudolphy agt. Fuchs.

Judgment of General Term reversed, and that of Special Term affirmed with costs.

The National Park Bank of N. Y. agt. The Ninth National Bank of N. Y.

Orders of the General and Special Terms of the Supreme Court reversed, and assessments vacated, with costs.

In the matter of the petition of George W. Douglass to vacate an assessment for regulating and grading 64th street, in the city of N. Y.

In the matter of the application of the N. Y. Protestant Episcopal school to vacate an assessment for sewer in 74th street, in the city of N. Y.

Orders of the Supreme Court at General and Special Terms and of the County Judge, reversed and application denied with costs.

People ex rel. White agt. Hulbert.

Order of the General Term of the Supreme Court affirmed with costs.

People ex rel. Perkins agt. Hawkins.

Judgment affirmed with costs, as to Learned, Dixon and Palmer, and judgment of Supreme Court reversed, and judgment on report of referee affirmed against Stevens, with costs, deducting \$130 08 from the original judgment, to correct an error of referee in computation.

Dabney agt. Stevens.

Judgment reversed and new trial granted costs to abide event, unless the defendant within 30 days after notice of this judgment, consents to the entry of a judgment against him for \$6,453 67, with costs in the court below, and in this court; and in that event the judgment thus modified, affirmed.

Currie agt. White.

Judgment of General Term reversed, and that on report of referee affirmed, with costs.

Childs agt. Smith.

Bendetson agt. French.

Decisions Court of Appeals.

Judgment reversed and judgment for the people, adjudging that the relator was not duly elected to the office, and that the act of the legislature extending the time of office of the defendant was unconstitutional and void, and that neither the relator nor defendant were entitled to the office, without costs to either party against the other.

People ex rel. Fowler agt. Bull.

Motion to dismiss appeal denied without costs.

Rathbone agt. The Northern Central Railway.

Motion to amend return on file denied without costs.

Leffler agt. Fields.

Judgment reduced to \$691 26 damages, payable in gold, with costs in Supreme Court, payable in currency, and as modified affirmed, without costs to either party, in this court.

Kellogg agt. Sweeney.

Order of the General Term of April 26th, 1871, and of Special Term of Sept. 27th, 1871, reversed and referred back to the referee to ascertain the value of the term according to the views expressed in the opinion of Judge RAPALLO and to report on the matters referred to him by the original order of reference.

Clarkson agt. Skidmore.

Order reversed with costs.

Pistor agt. Hatfield.

Orders of General and Special Terms reversed and application for mandamus denied with costs.

People ex rel. Downing agt. Davids.

Ordered that remittitur be amended by judgment, read judgments, and directing interest be allowed on to the \$500, from the date of the assignment to Miller & Callahan.

Beers agt. Hendrickson.

Order of General Term reversed and judgment on report of referee affirmed, with costs.

Parrott agt. The Knickerbocker Ice Co.

Order reversed and motion for mandamus denied with costs

People ex rel. Henry and others agt. Nostrand, Supervisor, &c.

Judgment of the Supreme Court modified and judgment ordered that if the plaintiff shall within thirty days pay the Tenth National Bank the sum of \$15,219 81, with interest from June 19th, 1868, &c.

McNeil agt. Tenth National Bank of N. Y.

Decisions Court of Appeals.

Judgment modified by directing a modification of the judgment of the Court below, to the effect that the same shall be without prejudice to any other action by the plaintiff.

Florence agt. Hopkins.

Judgment of the Supreme Court and of the Court of Sessions reversed, and judgment for the defendant.

McCord agt. The People, &c.

Order of General Term reversed and that of the Special Term affirmed, with costs.

People ex rel. Blossom agt. Nelson, Secretary of State.

Motions denied with \$10 costs.

People ex rel. Fowler agt. Bull.

Sage agt. Volkennig.

Motion denied without costs and without prejudice.

Fellows agt. Heermans.

Motion granted.

Berrian agt. Berrian.

Motion to dismiss appeal granted with costs of appeal to the time of motion, and \$10 costs of the motion.

Wilkins agt. Earle.

Appeal dismissed without costs.

Hilliard agt. Brown.



COMMISSION OF APPEALS.

DECISIONS RENDERED MAY, 19, 1871.

Judgment affirmed, with costs.

Vanderveer agt. Smith.
Jewell agt. Emson.
Kavanaugh agt. Beckwith.
Consalus agt. Brotherson.
Morange agt. Mix.
Goodrich agt. Thompson.
Lord agt. Fowler.
Abbey agt. Deyo.
Meeker agt. Claghorn.
Padden agt. Taylor.
Bedell agt. Long Island R. R. Co.
First National Bank of Angelica agt. Hall.
Wilcox agt. Howell.
Fanning agt. Van Nostrand.
Witty agt. Campbell.
Lord agt. Dougherty.
Sherman agt. Prince.
Hammett agt. Livermore.
Vose agt. Cockcroft.
Saxton agt. Zett.
Black River Bank agt. Page.
Lannen agt. The Albany Gas Light Co.
Gridley agt. The N. Y. Central R. R. Co.
In the matter of the application of Miller agt. Levi.
Bradley agt. Wheeler
Newton agt. Wales.
Read agt. Nusbaum.
Fish agt. Cottinett.
Bank of Commonwealth agt. Mudgett.
Ryder agt. Smith.
Brown agt. Smith.
Voorhies agt. Smith.
Gascoign agt. Smith.
Williams agt. Smith.

Decisions Commission of Appeals.

Bush agt. Smith.
Coe agt. Smith.
Farrington agt. Smith.
Brown agt. Smith.
Ryder agt. Smith.
Snydam agt. Smith.
Coney agt. Smith.
Brophy agt. Smith.
Barr agt. Smith.
Applegate agt. Smith.
Ryder agt. Smith.
Lord agt. Ostrander.

Judgment reversed, new trial granted, costs to abide event.

Van Brunt agt. Applegate.
Hudson agt. Caryl.
Wise agt. Chase.
Couch agt. Parker.
Wetmore agt. Goetzman.
Allen agt. The Mercantile Ins. Co.
Loomis agt. Brown.
Warner agt. The N. Y. Central R. R. Co.
Feuner agt. The Buffalo and State Line R. R. Co.

Re argument ordered

Wells agt. Miller.
Morgan agt. Hannan.

Order affirmed, with costs.

Yates agt. North.

Judgment affirmed by default, with costs.

Ayers agt. Farrell.
McMones agt. McKenzie.
De Rutte agt. The N. Y. and Buffalo Electro-Magnetic Telegraph-Co.
Delehanty agt. Seaman.
Van Buren agt. Ferris.

Judgment affirmed and costs of all parties on appeal to this court to be paid out of the estate.

Peck agt. Redfield.

Judgment reversed and judgment ordered for the plaintiff on the verdict, with costs.

Howell agt. The Knickerbocker Life Ins. Co.

Order affirmed by default with costs of appeal in this court, and judgment absolute

Decisions Commission of Appeals.

ordered in favor of the defendant against the plaintiff, with costs, pursuant to the stipulation contained in the notice of appeal.

Buell agt. Cole.

Order of General Term reversed and judgment ordered for the plaintiff upon the verdict, with costs.

Savage agt. O'Neil.

Judgment reversed, and judgment ordered for defendant, with costs.

Chamberlain agt. The Western Transportation Co.

Order affirmed and judgment absolute against the plaintiff, with costs.

Saunders agt. Haines.

Order of General Term reversed by default and judgment of Circuit affirmed with costs of General Term and of this Court.

Quinn agt. Skinner.

Order of General Term reversed, and order of County Court affirmed, with costs of the Supreme Court and Court of Appeals.

Fish agt. Emson.

Order of General Term reversed and judgment of Special Term affirmed with costs of appeal in the Supreme Court and this Court.

Cowdrey agt. Coit.

Order of General Term affirmed and judgment absolute for plaintiff ordered with costs.

Bottsford agt. McLean.

Judgment of Supreme Court reversed and judgment of County Court affirmed with cost and restitution.

Allen agt. Godfrey.

Order of Supreme Court reversed and order of the City Court of Brooklyn affirmed with costs of appeal to the Supreme Court and this Court.

Sager agt. Blaine.

Order of General Term reversed with costs and judgment upon the nonsuit ordered against the plaintiff with costs.

McPadden agt. The N. Y. Central Railroad Co.

Judgment affirmed without costs to either party in the Court of Appeals, provided the plaintiff shall within thirty days after the entry of this order serve on the defendants'

Decisions Commission of Appeals.

attorney a stipulation deducting from the judgment of April 6th, 1863, as of that date, the sum of \$2,407 15. If such stipulation be not served, then the judgment is reversed and new trial ordered, costs to abide the event, the judgment to be settled by Judge HUNT if the attorneys do not agree on the same.

Wells agt. Yates.

DECISIONS RENDERED SEPTEMBER 29th, 1871.

Judgment affirmed with costs.

Lane agt. Bailey.
 Berdan agt. Sedgewick.
 Kay agt. Whitecar.
 Corning agt. The Troy Iron and Nail Factory.
 Dudley agt. See.
 Goldsmith agt. Schiffer.
 Laird agt. Smith.
 Downer agt. Church.
 Sturgiss agt. Spofford.
 Champion agt. Joslyn.
 Cross agt. O'Donnell.
 Moore agt. Hamilton.
 Norton agt. Lord.
 Mellick agt. Knox.
 The President &c. of the Chemung Canal Bank agt. Bradner.
 Smith agt. Van Olinde.
 Greene agt. Kennedy.
 The Marine Bank of Chicago agt. Wright.
 Parsons agt. Loucks.
 Tracy agt. Frink.
 Murray agt. The Hudson River R. R. Co.
 Redpath agt. Vaughn.
 Wells agt. The Connecticut Mutual Life Ins. Co.
 Wilder agt. Stearns.
 Ames agt. Hines.
 Wilson agt. Blodgett.
 Kerr agt. Blodgett.
 Donley agt. Graham.
 James agt. Gurley.
 People ex rel. Buffalo and State Line R. R. Co. agt. Barker.
 The Buffalo and State Line R. R. Co. agt. Frederick.
 Bush agt. The Rochester City Bank.
 Breeze agt. The U. S. Telegraph Co.
 Smith agt. Lippincott.
 Marsh agt. Rouse.

Judgment reversed, and new trial granted, costs to abide event.

Sands agt. Graves.
 Terry agt. Wait.
 Hicks agt. Cleveland.

Decisions Commission of Appeals.

Buffalo and State Line R. R. Co. agt. The Board of Supervisors of Erie County.
 Buffalo and State Line R. R. Co. agt. The Board of Supervisors of Erie County.
 Buffalo and State Line R. R. Co. agt. The Board of Supervisors of Erie County.
 Buffalo and State Line R. R. Co. agt. The Board of Supervisors of Erie County.
 Gage agt. Babcock.

Order of General Term reversed, and judgment upon report of referee affirmed with costs.

Marvin agt. Bissel.
 Marvin agt. Tallmadge.
 Tomlinson agt. The Mayor of the City of New York.
 Ball agt. Liney.
 Ruhl agt. Philips.

Order affirmed and judgment absolute against the defendant with costs.

Duffy agt. Masterson.

Judgment reversed and judgment for plaintiff for amount of notes and interest, with costs.

Pratt agt. Chase.
 Shreve agt. Chase.

Judgment reversed and new trial ordered, with costs of the appeal to the Supreme Court and Court of Appeals, to the defendants.

Baldwin agt. Humphrey.

Judgment affirmed by default, with costs.

Friedberg agt. Lynch.
 Johnson agt. Curtis.

Order of General Term affirmed and judgment absolute against the plaintiff, with costs.

Consalus agt. Brotherson.
 Lynch agt. Johnson.

Re-argument ordered.

Jones agt. The Terre Haute and Richmond R. R. Co.

Judgment of General Term reversed, and judgment ordered for the plaintiff upon the verdict, for \$2,144 36, interest and costs less \$273 70, and interest thereon from July 14, 1861.

Hotchkiss agt. The Commercial Mutual Ins. Co.

Judgment affirmed with costs of appeal to this court, to be paid by appellant, judgment to be entered as of January 1, 1868.)

Scott agt. Guernsey.

Decisions Uommission of Appeals.

Order of General Term affirmed and judgment absolute for the plaintiff, with costs.

McKenzie agt. **Smith**.

Order of General Term reversed and motion denied, with costs of appeal to the General Term and Court of Appeals.

Fisher agt. **Heppurn**.

ERRATA.

The word "aciton" in line four from the bottom page 267 *ante* should read "section."

The word "lay" first word on page 252 *ante* should read "lie."



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